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THE
AMERICAN PROBATE REPORTS:

CONTAINING

RECENT CASES OF GENERAL VALUE DECIDED IN
THE COURTS OF THE SEVERAL STATES ON
POINTS OF PROBATE LAW.

WITH NOTES AND REFERENCES.

By WM. W. LADD, JR.

VOL. III.

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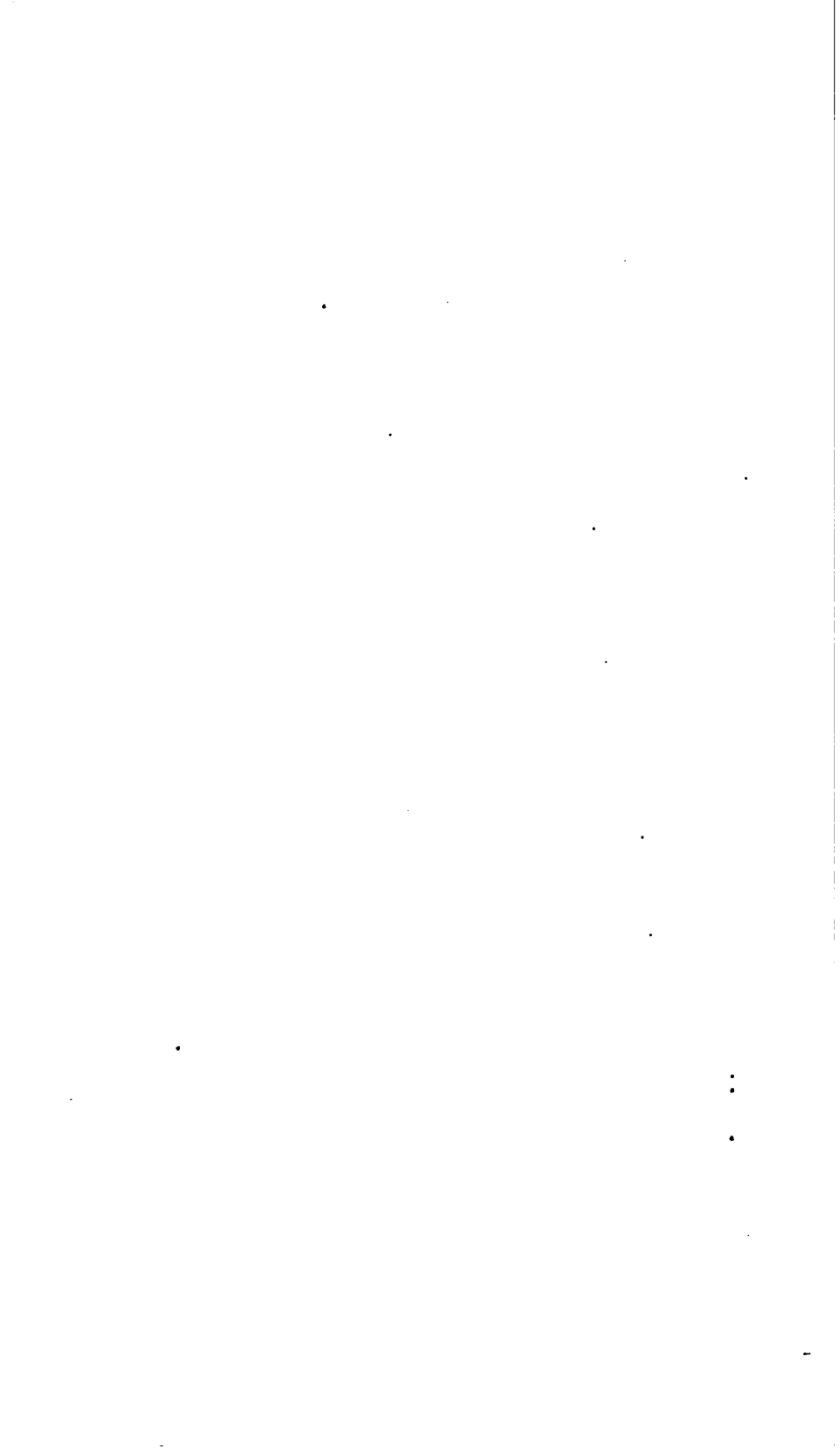


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T H E

AMERICAN PROBATE REPORTS.

APPEL vs. BYERS.

[98 Penn. St. 479.]

**ADMISSIBILITY OF EVIDENCE TO SHOW ILLEGITIMATE CHILD
INTENDED AS DEVISEE RATHER THAN LEGITIMATE.**

Where testator made a devise to "my nephew, Philip Byers," and died leaving a legitimate nephew of that name, evidence is not admissible to show that he intended an illegitimate nephew who also survived.

ERROR to the Court of Common Pleas of Allegheny county.

Ejectment for a plot of land by Philip Byers against Tobias Appel.

Both parties claimed title under the will of Peter Byers, which contained the following clause:

"I will, devise and bequeath to my wife Margaret, all my estate, be the same real or personal, and wheresoever situated, during her natural lifetime. It is my will, and I hereby devise that my nephew, Philip Byers, shall have and hold, after the death of my wife, all my real and personal estate."

Testator's widow died in 1880.

The jury found a special verdict upon which judgment was entered for the plaintiff.

Miller, McBride and Goehring, for plaintiffs in error.

Walter G. Crawford, for defendants in error.

MERCER, J. Each party claims title to the land in question, under the same clause in the will of Peter Byers. He therein declares "I hereby devise that my nephew, Philip Byers, shall have and hold, after the death of my wife, all my real and personal estate."

The jury returned a special verdict wherein they found "that the testator, Peter Byers, died leaving two nephews, one Philip, the son of Martin, legitimate; another Philip, the son of Louis, illegitimate." Also that the nephew intended by the testator to inherit, was Philip the illegitimate nephew, the son of Louis, and this from evidence *aliunde* the will, and not from the will itself." Thereupon the court entered judgment in favor of the heirs of Philip the illegitimate. This presents the main cause of complaint.

Looking at the language of the will we see it is clear and unambiguous as to the property devised and the object of the testator's bounty. That object is his nephew Philip Byers.

A bastard, at common law, is *nullius filius*. As he is the son of no one it is difficult to see how he can be the nephew of any one. If Philip the son of Louis was not the lawful child of a brother or sister of the testator, he could not be a lawful nephew of the latter. The question then is, when Philip the son of Martin clearly and in all respects satisfies the terms of the will, may it be shown by other evidence, that not he, but another person, was the one intended by the testator?

Philip the son of Martin was lawfully the nephew of the testator; Philip the son of Louis was not such a nephew. This is not the case of a question between two legal nephews of the same name, or of names in some respects different. Nor is it a case where the name is not accurately expressed in the will.

A gift to children means legitimate children only, unless it appears from the context, or from circumstances, that illegitimate children must have been intended. (Hawkins on Wills, 80.) The same rule applies to gifts to sons, issue and terms of relationship generally. (Id.)

In *Cartwright v. Vawdry*, 5 Ves. 530, the testator left his property to his children equally. He had four daughters, and

it was not known that one of them was illegitimate. She lived with him just as his other daughters. He treated her in all respects like the others, and intended that she should take with them, yet it was held she could not take—the lord chancellor declaring “it is impossible, in a court of justice, to hold that an illegitimate child can take equally with lawful children upon a devise to children.”

A man who had two illegitimate children by a certain woman married her, and the day after his marriage made a will in which, after leaving her his real and personal estate for life, he said “I leave her at liberty to direct the disposal of the property amongst our children by will at her death in such manner as she shall see fit, and should she make no will, I desire that the property existing at her death shall be divided, as far as it may be practicable to do so, equally between my children by her.” The testator had no children born to him after this marriage; but lived for some time and always treated the two illegitimate children as his own children: yet it was held the testator died intestate as to the real and personal estate, beyond the interest given to the widow for her life. (*Dorin v. Dorin*, Law Rep. 7 H. L. 568.) It was there held that the word “children,” in a will means, *prima facie*, “legitimate children;” as much so as if the word legitimate had been introduced before it.

In *Ellis v. Houstoun*, 10 Law Rep. Chanc. Div. 236, the testatrix gave a sum in stocks to trustees upon trust to pay the dividends to her brother Charles Ellis and his wife Elizabeth for their lives, and after the death of the survivor, the capital to be divided between all and every the children of her brother who should then be living, and the issue of such as shall then be dead. The brother had three children by his first wife; two children by his second wife, Elizabeth, before marriage, and one child after marriage. The fact that these two children were illegitimate was well known to the testatrix. She promised her brother if he married Elizabeth she would provide for all his children by her, and thereupon the marriage took place. Thenceforth the testatrix continued on intimate and affectionate terms with the two illegitimate children, in all respects

treating them as her nephews. Prior to the execution of her will she told them she would provide for them therein, and after its execution she told them she had so provided, and had made no distinction between them and their brothers and sisters. Still further, when she made her will she gave instructions to that effect, and understood the language used was sufficient to identify the two illegitimate children and to include them among the children of Charles and Elizabeth Ellis. Yet it was held that the illegitimate children must be excluded from the bequest; that the words of the will being distinct, no extrinsic evidence could be received to show what the intention of the testatrix was; the vice-chancellor saying: "I believe the law is firmly settled that where you have a bequest of property to a class of persons—children, nephews or nieces or any class you like—and you find in the class designated legitimate members, you can never admit illegitimate persons to share with them." This case, decided only three years ago, but ruled on many previous authorities, shows the settled law in England. The fact that in Pennsylvania, the subsequent marriage and cohabitation of the father and mother of an illegitimate child or children legitimates it or them under the statute, does not impair the force of the rule excluding illegitimate children. Here, after marriage, such children born before, take not as illegitimate children; but, having the legal taint removed, they take as if "born during the wedlock of their parents."

No American authority was cited which maintains the right of illegitimate persons to share with those who are legitimate when the latter are found, and strictly and fully answer the description in the written will.

Without regard to illegitimacy, the better and more authoritative rule is, that the intention of the testator, as expressed in the will, must govern in its construction.

If, however, there is a mistake in the description, so that no one corresponds to it in all respects; but some one does in many particulars; and no other does who can be intended, such person will take. Or if the will be plain and clear on its face, and only becomes doubtful when applied to the subject

matter, extrinsic evidence of the intention of the testator may be received. Unless there be some ambiguity or obscurity on the face of the will, or difficulty in finding the person or object to which it applies, extrinsic evidence should not be received to divert the will from the intention therein expressed. In *Tucker and others, Executors v. Seamen's Aid Society*, 7 Metcalf, 188, the testator gave a legacy to "The Seamen's Aid Society in the city of Boston" and "The Seamen's Friend Society" claimed the legacy. The latter offered to prove that the testator had no knowledge of the existence of the society named in the will; that he did know of the other society; was deeply interested in its objects; had contributed to its funds, and had frequently expressed a determination to give it a legacy; that he directed the scrivener who wrote his will to insert the legacy as made to said society; but the scrivener, not knowing the existence of the society, told the testator the name of the society was "the Seamen's Aid Society," and the testator thereupon consented to have that name inserted. This evidence was held inadmissible, and that the society named and described in the will was entitled to the legacy.

It is true in *Powell v. Biddle*, 2 Dall. 70, tried in the Common Pleas of Philadelphia in 1790, it was held that extrinsic evidence was admissible to award the legacy contrary to the express designation of the will, although the person accurately described therein existed. No question of illegitimacy arose in that case. The case is without authority to control us, and I do not find the principle there declared, recognized by a higher court as a correct exposition of the law. On the contrary, in *Wusthoff v. Dracourt*, 3 Watts, 240, the question of admitting such evidence is discussed by Mr. Justice Rogers. After declaring that courts of law have always leaned against parol evidence to explain the intention of the testator, and that it can be admitted only where the ambiguity arises from extrinsic circumstances, so that the evidence is admitted from necessity, he proceeds to say, "The modern doctrine is, that where a subject exists which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity. Evidence is only admitted dehors the will from neces-

sity to explain that which would otherwise have no operation.

If the rule were held otherwise a person could feel no security in making a will. His intention, clearly expressed in writing, and the object of his bounty found in all respects answering the description, might be defeated, and the statute relating to wills be practically inoperative. If the language of this will applied to two legitimate nephews, so that either could take, but for the existence and claim of the other, then parol evidence would be admissible to prove which was intended.

In the present case there is neither patent nor latent ambiguity. The legitimate nephew precisely and in every respect answers the designation and description of the will; the other fails in law to be a nephew.

It was alleged on the argument that the legitimate nephew was in truth named Philip A. Byers, although not generally so called, and therefore did not precisely answer the description in the will. A sufficient answer to this is the special verdict finds no such fact. It declares there are two Philip Byers, one legitimate, the other illegitimate. Whatever is not found in a special verdict is to be considered as not existing. The verdict cannot be aided by extrinsic facts, even if they appear on the record. (*Vansyckel v. Stewart*, 27 P. F. Smith, 124.) The court must declare the law on the facts found alone. They must be self-sustaining, and cannot be aided by any outside support.

This verdict shows that Philip Byers, the legitimate nephew of the testator, fully satisfies all the terms of the will. To him they are perfectly and solely applicable. Being thus distinctly and accurately described, there is no ambiguity to be explained. There is no necessity to go beyond him to give full effect to the will. To do so would not be to solve doubts or explain any obscurity; but to create them where none existed before. Under the facts found, the learned judge erred in entering judgment in favor of the heirs of the illegitimate person on the question of law reserved.

Judgment reversed, and now judgment in favor of the defendant below (plaintiffs in error), *non obstante veredicto*.

HESKETH vs. MURPHY.

[36 New Jersey Eq. 304.]

CHARITABLE USE.—GIFT FOR RELIEF OF MOST DESERVING POOR
OF A CITY.

A direction that the annual interest of a fund shall be distributed by trustees for "the relief of the most deserving of the poor of the city of Paterson aforesaid, forever, without regard to color or sex, but no person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from the said fund," creates a valid charitable use.

The power to choose the beneficiaries exists in the trustees by implication.

ON appeal from a decree of the Chancellor.

The questions discussed arose upon the following clauses in the will of William S. Malcom, dated December 18, 1871:

"And after the death of my said wife, I hereby empower and direct my said trustees or trustee for the time being of this my will, to employ the annual income of the said moneys so invested, and from time to time to be invested, for the relief of the most deserving poor of the city of Paterson aforesaid forever, without regard to color or sex, but no person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from the said fund.

"And for the purpose of preserving and continuing a perpetual succession of trustees for the purpose of carrying into full effect the provisions of this my will, I do hereby empower my said trustees or trustee for the time being, if any, whether retiring from the office of trustee or not, or if more, then I direct and hereby empower the proving executors or executor for the time being, or the administrators or administrator for the time being of the last surviving trustee, to substitute by any proper writing under his, her or their hands or hand, any fit person or persons, in whom alone, or as the case may be, jointly with the surviving or continuing trustees or trustee, my trust estate shall vest or proper assurances be vested."

Bolton & Gourley, for appellant.

H. A. Williams, for respondents.

BEASLEY, C. J. This bill has been exhibited by the sister of William S. Malcom, deceased, for the purpose of obtaining a judicial construction of those certain clauses of his last will which are prefixed to this opinion. The testamentary provision thus put to the test is a charitable bequest, and the view which the counsel of the complainant pressed upon the court was, that such bequest is void, on the ground of its indefiniteness with respect to its objects.

Upon recurring to the language of that portion of the will which is thus impugned, it will be found that the annual income of a certain fund, which is in the hands of certain trustees appointed by the testator, is to be employed by them for the relief of such of the most deserving poor of the city of Paterson as are not intemperate, lazy or immoral. The testator has not left his intention in any wise in doubt. His purpose is plainly charitable in the legal sense. He has constructed a trust to carry such purpose into effect, and the class of persons who are to be his beneficiaries is clearly defined. But the contention is, that the persons who from time to time are to compose this class of beneficiaries must be possessed of certain specified qualifications distinguishing them from their associates in poverty in the city of Paterson, and such qualifications are of a kind not easily ascertainable, and inasmuch as a power of such ascertainment is not by the will conferred upon any one, the gift cannot be applied to its objects, and is therefore void.

That a charitable use may be inefficacious on account of the indefiniteness or unascertainability of its purposes or objects, is readily admitted. Nor is it denied that certain gifts of this kind which, under some circumstances, would be put into effect by force of the ancient English legal system, would, under like conditions, prove unavailing if brought *sub judice* in this State. In England, the lord chancellor, in matters of this kind, transcends judicial methods, and will effectuate one of these bequests where the general purpose of the donor is charitable, although the particular purpose which has been designated by him has failed and no trust has been created; but this is by force of a prerogative derived from the king, who is said to possess it as *parens patriæ*. And it is this latter extraordinary power

which has been almost universally conceded not to belong to the courts of this country. But with the exception of this prerogative, I am not aware that the court of chancery of this State is devoid of any power which has ever been exerted by an English chancellor with respect to the construction, regulation or enforcement of devises or bequests to charitable uses.

Our equitable system is a copy and counterpart of the English chancery, and does not differ from it except wherein it has been varied by positive law, ancient custom, or by conditions of life plainly incompatible with its regulations. In the main, the equitable jurisdiction exercised in this State can be expressed, and can be expressed only, in the terms that define the boundaries of its archetype. Such is the admitted condition of all our superior tribunals, for their essential substance and qualities are derived to us, as a people, by descent, and do not exist by mere legislative sanction. Hence it would seem to follow, by irresistible inference, that whatever power touching charitable gifts was originally, as a pure judicial function, vested in the chancellor of England, is vested in the chancellor of this State, for there is no statutory law, as I think, nor custom, curtailing such power, nor is its exercise inconsistent, in any degree, with our social or political situation. It is true that the English statute of charitable uses is not in force in this State, and, so far as such statute may be said to have enlarged the sphere of equitable jurisdiction over this subject—though the supposition seems to be unfounded—to that extent the judicial power of our chancery may be wanting. But the present occasion does not call for the consideration of the involved and much-contested question as to the effect of this act over the equitable doctrine of charitable uses, for whether such enactment is to be regarded as having added something to the extent of the equitable cognizance over the subject, or, as Lords Hardwicke, Eldon, Redesdale and other chancellors declared, created no new jurisdiction, but merely provided a novel mode of proceeding in cases of the misappropriation of charitable funds, still it has been made certain by modern research that the primitive and inherent powers of a court of equity in this domain are *sui generis* and of a very extensive character, and,

as has been above stated, whatever such original authority was, it exists in full vigor in the hands of the chancellor of this State, and it is in accordance with this theory that the few judicial examinations of this subject which have taken place in our courts have been conducted. Thus in the case of *The New York Annual Conference Ministers Mutual Assistance Society v. Executors of Clarkson*, 4 Hal. Ch. 541, the bequest was in the following words:

"I give and bequeath unto the New York Methodist Conference Society, for the support of old, worn-out preachers, the sum of three thousand dollars."

The complainant in the case, and which was thus misdescribed in the will, was an incorporated body whose purpose was to raise funds for the relief of such of its members, who were all ministers and preachers of the gospel attached to and connected with the New York conference, as were in necessitous circumstances through age, disease, or other natural infirmity, as also the needy wives and children, widows and orphans of its members. This bequest was sustained as a charity notwithstanding its beneficiaries were a sub-class of the beneficiaries of the corporation, which sub-class of necessity would have to be selected, and no express powers to make such selection had been given by the testator. A similar doctrine was enforced in *McBride v. Elmer's Executors*, 2 Hal. Ch. 107, which was decided in the year 1847. A fund of \$1,000 was bequeathed to "The Bridgeton Trustees for Free Schools," the interest to be applied annually for ages, as far as might be practicable, for the tuition of poor children, without regard to denomination or color, in the elements of English literature. In this case, likewise, there was a misnomer of the trustees, and there was no power in terms conferred to settle who came within the class appointed to take as beneficiaries, yet, nevertheless, the court, after a learned argument, sustained the testamentary disposition as a charitable use. The following are cases in which, in the court of chancery, similar views have been expressed and like judgments have been rendered: *Magie v. German Evangelical Dutch Church*, 2 Beas. 77; *Mason v. Methodist Episcopal Church*, 12 C. E. Gr. 47; *Stevens v.*

Shippen, 1 Stew. Eq. 457. And that the peculiar nature of the English law relating to charitable uses is not a matter of interests on judicial functions is plainly recognized in *Attorney-General v. Dobbins*, 4 Stew. Eq. 671; *Attorney-General v. Mowbray*, 4 Stew. Eq. 489; *Attorney-General v. Mowbray*, 4 Stew. Eq. 489.

This being the condition of the judicial mind upon the subject in this State, it becomes at once apparent that all of the decisions which are so numerous and which are thrown upon the attention of this court in the course of the course of the appellant, cannot be looked upon in the light of authority. With the single exception just noted, and which is an illustration which will be presently referred to, none of the cases in question are examples of gifts that must be for some purpose other than charitable uses, or are determined by the existing in jurisdictions in which the doctrine governing the English sources that regulates the subject of such matters has no place, and in which bequests for such objects are regarded as private trusts, and are construed and regulated in that manner. To the former of these two classes of cases the English cases which are cited appertain, for they are either private trusts, or like the case of *Norris v. Thompson's Executors*, the bequests in question embrace a use other than a charitable one. It would serve no useful purpose to consider those references in detail. It is enough to say that they have been carefully examined, and that they are not pertinent on the present inquiry. In the other class, decisions are cited rendered by the courts of Maryland, North Carolina and New York; but inasmuch as in those States it has been declared that the rules to be applied in the construction and administration of trusts for charitable uses are, in their respective jurisdictions, the same as are the rules by which private trusts in favor of individuals are administered, they can have no influence on the judicial mind in this State, in which an entirely different system, as has been already stated, has always prevailed. But I have alluded to an exception, one case to be found among the citations of counsel of American cases, and that case is the decision in *White v. Fisk*, 22 Conn. 31. The bequest in that case was in these words:

"Any surplus income that may remain to the extent of \$1,000 per annum, I direct to be expended by my said trustees for the support of indigent pious young men, preparing for the ministry in New Haven."

The judgment was that the gift was void, as the objects of the benefaction were indefinite, and that no power was conferred on the trustees to make them definite by selection. This case is certainly in all respects much in point, and in the jurisdiction in which it occurred, and was decided, the equitable rules which prevail with respect to this branch of the jurisprudence, appear to be very similar to those that are in force in this State. But it seems to be very clear that the court, on the occasion in question, fell into error in the application of one of the principles belonging to the subject adjudged by it, and I therefore agree to the criticism of Mr. Perry, in his excellent treatise on Trusts, that this decision is not one that is likely to be followed.

The mistake referred to consists in the assumption after, apparently, but a slight consideration of the topic, that there was no power to select the objects of the charity lodged by the testator in the trustees, whereas, as I am constrained to think, in view of the very liberal rules of construction which have always been declared to be applicable to occasions of this character, such power was clearly conferred upon such officers. In such matters the paramount business is to ascertain from the language of the will, as explained by the subjects to which it pertains, the purpose of the testator, and if such purpose be not illegal, and can be plainly ascertained, to carry it into effect. And it is to be remembered that it is the acknowledged doctrine that in all matters of construction courts are bound to lean in favor of charity rather than against it. And, indeed, so far has this legal favoritism been carried that it has been for ages the settled rule in the English law, and has been in this country often regarded as the true principle, that when a gift has been placed in the hands of a trustee to promote a charity, and which, from the mutation of circumstances, had become incapable of fulfillment, such gift was to be applied by the courts, exercising a purely judicial authority, to some cognate object, on the ground that it was the presumed intent of the testator

that the fund so set apart as a benefaction should not, in any event, return to his estate. The present case does not call for any opinion on the important question how far, in the application of simply judicial standards, the courts of this State would undertake to exercise the doctrine of *cy pres* by construction; the subject is referred to only for the purpose of exemplifying with what strength of favor charitable bequests are regarded by the courts. But without resorting to a method of interpretation which, until it has received the sanction of the courts of this State, must be considered as of questionable validity, and following none but the ordinary guides in the construction of wills, I cannot doubt that the inevitable conclusion must be that the testamentary disposition in the case cited from the Connecticut reports, as well as the one now under consideration in this court, confers upon the trustees not only the power to distribute the funds confided to them, but, as a necessary incident to that function, also the right to select the beneficiaries. It is the ordinary doctrine that when an act is authorized to be done by a trustee or other agent, every authority requisite to the doing of such act is, by intendment of law, comprised in such grant of power. A common example of this rule is presented in cases in which a power of sale is given by a will without in terms specifying by whom it is to be exercised, but if the proceeds of the sale are directed to be distributed by an executor or trustee, in such instances it has been held in numerous decisions that such executor or trustee will take, by implication, the power of selling, unless some other intent is discoverable from the whole will. (*Newton v. Bennet*, 1 Bro. C. C. 135; *Bentham v. Wiltshire*, 4 Madd. 44; *Blatch v. Wilder*, 1 Atk. 420.)

When, therefore, in the Connecticut case and in the present case, a power is conferred on the trustees to distribute the fund to members of a class, such members having certain qualifications, which can be ascertained only by the exercise of judgment and discretion, as the act of distribution cannot be performed except after such ascertainment of the particular beneficiaries, the principal power to distribute the moneys carries with it, on the ground of the principle just mentioned, the in-

cidental and necessary power of selection. That such was the intent of the testator would seem to be plainly manifest from the nature of the thing, the doing of which he has directed. If a gift of a sum of money were given to a clergyman with directions to distribute it among the most worthy and needy of his flock, no one, it is presumed, would doubt that the power to select the objects of such beneficence was intended to be lodged in him who was to dispense the fund. In this example, as well as in these testamentary gifts, inasmuch as the power to select is an indispensable preliminary to the power to dispense, the natural and reasonable inference arises that when the latter is expressly given the former is impliedly given. As far as I have noticed, this has been, except in the case of *White v. Fisk*, the judicial deduction from similar premises.

In the case of *Trustees of the Philadelphia Baptist Association v. Hart's Executor*, 4 Wheat. 1, Chief Justice Marshall appears to have had no doubt on this subject. The words of the will in that case were :

"What remains of my military certificates at the time of my decease, both principal and interest, I give and bequeath to the Baptist Association that for ordinary meets at Philadelphia, which I allow to be a perpetual fund for the education of youths in the Baptist denomination who shall appear promising for the ministry, always giving preference to the descendants of my father's family."

It is observable that here is no express authority to the designated association to make a selection of the beneficiaries entitled to take under this bequest, and yet the chief justice drew the inference, apparently without the least hesitation, that such was the province of that body. The court in this case decided on grounds that have been much shaken, but with which at present we have no concern, that the association that was constituted the trustee being unincorporated could not stand in such capacity, and consequently the question whether the beneficiaries were, in the absence of such officers, sufficiently indicated, became important, and upon that subject the court said : "This question will not admit of discussion. Those for whose ultimate benefit the legacy was intended are *to be desig-*

nated and selected by the trustees. It could not be intended for the education of all the youths of the Baptist denomination who were designed for the ministry, nor for those who were the descendants of the father, unless, *in the opinion of the trustees*, they should appear promising. These trustees being incapable of executing the trust, or even of taking it on themselves, *the selection* can never be made nor the *persons designated* who might take beneficially." In this case it will be observed that the fund was given to the association, without any expressed direction for it to distribute such fund or to select the beneficiaries, and yet, looking to the evident intention of the testator, both such powers were unhesitatingly gathered by intendment. To the same purport, and equally strong on the point, was the action of Lord Redesdale, in the case of *Mahon v. Savage*, 1 Sch. & Lef. 111, in which the bequest was of £1,000, with the following directions:

"To be distributed amongst his poor relations, or such other objects of charity as should be mentioned in his private instructions to his executors."

There were no such private instructions left by the testator, and there were over fifty poor relations. The chancellor, after remarking that the bequest was a charitable one, and that the objects meant were the testator's own relations, added: "Here the testator's design was to give them as objects of charity, and not merely as relations, and I take it, the executors have a discretionary power of distribution, and need not include all the testator's poor relations."

Here, again, there was nothing in the will from which the testator's intention to confer upon his executors the authority to select the beneficiaries except the authority given to them to distribute the fund, and yet this eminent judge thought that such intention was clear as a plain inference. These two cases put the matter, in my opinion, on a legal basis. The principle adopted by these great judges, if applied to the case now before the court, must obviously lead to an affirmance of the decree appealed from; for if we assume, as was done in the decisions just referred to, that the power to employ this charity involves the power of selecting the beneficiaries, the case is divested of

every element of uncertainty. In view of the recognition of such an hypothesis, the case will then present these simple characteristics: A bequest in trust to a charitable use, for distribution among a class of undesignated persons, with a power in the trustees to designate such persons. It is presumed that in such a posture of things no one will assert that the bequest is not to be sustained. The decree should be affirmed.

Decree unanimously affirmed.

See *Simpson v. Welcome*, 2 Am. Prob. R. 248; *Nichols v. Allen*, Id. 369.

BRUBAKER'S APPEAL.

[98 Penn. St. 21.]

JOINT ADMINISTRATION—PROTEST OF ONE JOINED.

Joint administration should not be compelled against the protest of one of the parties thereto.

When the class primarily entitled to administration consists of several persons letters should be granted to such one or more of them as the register judges will best administer the estate.

APPEAL from Lancaster county Orphans' Court.

The facts sufficiently appear in the opinion.

H. C. Brubaker and *A. J. Eberle*, for appellant.

S. P. Ely, for appellee.

STERRETT, J. Jacob Shaeffer survived his wife and died intestate August 14th, 1880, leaving as his only heirs-at-law two married daughters, Elizabeth Brubaker and Lavina Wolf. Ten days after his decease letters of administration on his estate were duly granted by the register to Mrs. Brubaker, the

elder daughter; and on September 2d the petition of the younger daughter and her husband was presented, praying that she be joined with her sister in the administration already granted. This application was refused by the register, and thereupon the petitioners appealed from his decision to the Orphans' Court, and a rule, with notice to Mrs. Brubaker, was granted, to show cause why Mrs. Wolf should not be joined in the administration. Under this rule depositions were taken by both parties, and the court, after hearing, on January 29th, 1881, made a decree sustaining the appeal, and ordering letters of administration to be issued to Mrs. Wolf "on her father's estate, upon her entering good and sufficient security with the register for the faithful performance of her duties as administratrix, providing her husband's assent is obtained; which assent will be evidenced by his joining in the administration bond."

It is contended that the court erred in thus ordering letters of administration to be issued to Mrs. Wolf, and in forcing a joint administration, against the consent of Mrs. Brubaker, to whom letters had been previously granted.

The learned judge in his opinion says: "The present administratrix and the appellant are both equally competent to perform the duties of administrator; both stand in equal degree of relationship to the decedent; both have equal share or interest in his estate; and looking on this appeal, we look at the whole case on its merits and the rights of the respective parties, and we are of the opinion that letters of administration should be granted to this appellant, that both may be on an equality. But the court does not feel at liberty to enjoin a joint administration between these sisters; indeed, the prevailing rule is not to enforce a joint administration on unwilling parties."

It is very evident from this that the court recognized the impropriety of attempting to create a joint administration against the protest of one of the parties thereto. The nature of the office forbids it. Joint administration necessarily involves joint liability, and no one can be compelled to assume such responsibility. Due regard to individual rights, as well

as the interest of the estate, require that administration should not be committed to two or more persons unless they mutually agree to accept the trust. Nor does the decree in this case require joint administration. If it did, it would be manifestly wrong; but its effect is to create two separate, co-ordinate administrations on the same estate, and for that reason it is equally objectionable. Such a thing is unknown to our jurisprudence, even in theory, and in practice it would be entirely impracticable. Under the English statute, the Ordinary may commit the administration to the widow and next of kin jointly or he may grant to one exclusive administration of a particular portion of the goods of the intestate, and to the other a separate administration of the residue; but no warrant for any such practice as that contemplated by the decree of the Orphans' Court can be found in our statute.

When the class primarily entitled to administration consists of several persons, it is the duty of the register to grant letters to such one or more of them as he shall judge will best administer the estate. He may thus grant letters to them all jointly, if they so desire; or, in his discretion, he may select one of them and commit the administration to him alone, to the exclusion of the others; and, when properly exercised, his discretion is not the subject of review, either in the Orphans' Court or here. He is not bound to select the oldest in preference to the youngest of the class entitled to administration. Primogeniture gives no right of preference, so as to weigh against the wish of the majority of interests; yet, if things are precisely equal—if the scale is exactly poised—being the elder brother would incline the balance. (Hood on Executors, 64; 1 Williams on Executors, 427.) And the same principle applies to the elder of two sisters. In *Shomo's Appeal*, 7 P. F. Smith, 356, it is said that among children the right does not depend on seniority; it is entirely in the discretion of the register; but when he has exercised his discretion by selecting one of the sons, it is no longer in his power to revoke the letters thus granted and issue them to another, except for sufficient cause. "When administration has been committed to any of the next of kin, others, even in the same degree of kindred, have, during the life of the adminis-

trator, no title to a similar grant." (Hood on Executors, 64.) In the case before us the two daughters of the intestate were equally competent to administer, and the register might have granted letters to both jointly if they had desired; but he was not bound to do so. In the exercise of his discretion he selected Mrs. Brubaker, who requested that letters should be issued to herself alone. Having done so, it was not in his power to revoke the letters thus granted, or to join the younger sister in the administration against the will of the other. Nor is there anything in the circumstances, as disclosed by the testimony, to justify the court in reversing the decision of the register and creating a dual administration, which, if it could be permitted to stand, would undoubtedly be prejudicial to the interests of the estate.

The decree of the Orphans' Court is reversed and set aside, and the decision of the register is affirmed; and it is ordered that the costs, including the costs of this appeal, be paid by the appellee.

ISLER vs. ISLER.

[88 N. C. 581.]

ELECTION BY DEVISEE TO TAKE UNDER WILL, OR RETAIN HIS
PROPERTY DEVISED TO ANOTHER.

Where a testator expresses a manifest purpose of disposing of property of another to whom the testator devises property of his own, it is immaterial whether he believed he had title and the right to will it; or, where the testator, having an undivided interest in the property, devises it specifically. In either case, the devisee or co-owner must elect between his interest in the same and any other interest he may take under the will.

APPEAL by defendant from Wayne Superior Court.

Faircloth & Allen, for plaintiff.

Battle & Mordecai, for defendant.

RUFFIN, J. The court thinks that the equitable doctrine of election has a direct application to this case and must govern it.

The facts are these: Simmons Isler, Senr., died in 1839, leaving a last will in which he devised and bequeathed the principal part of his estate to his widow, Barbara M., for life, with remainder to her four sons, the plaintiff and the defendant, and their two brothers, George M. and William R. The two last named died in the lifetime of their mother, unmarried and without children, so that the whole estate in the remainder created by the will is vested in the parties to this action.

Amongst the things thus given to the widow for life were two slaves, Harriet and Allen, which she afterwards sold absolutely to one Kornegay, at the price of two thousand dollars in cash. This sum, together with a thousand dollars of her own money, she used in purchasing a house and lot in the town of Goldsboro', from one L. W. Humphrey, and took a deed therefor in fee in her own name and right. She died in 1879, leaving a will in which she devised the lot so purchased to the defendant, describing it specifically as the lot purchased from Humphrey. In another clause of the same will, she devised to the plaintiff another house and lot in the same town, and also bequeathed to him the sum of one thousand dollars in money.

In his complaint, the plaintiff insists upon his right to follow the fund arising from the sale of the two slaves into the house devised to the defendant, and asks that the latter may be declared a trustee to his use and benefit to the extent of his interest in the fund, and may be directed to convey to him his proportionate part of the lot in question.

These facts present simply the case, which is always aduced for the purpose of illustrating the doctrine of election (whenever that subject is discussed) of a testator disposing of the property of another, and at the same time and by the same will giving to that other, property of his own, in which case, according to all the authorities, the party is put to choose between taking, either under the will or against it, and will not be permitted to enjoy both benefits.

The general doctrine was conceded by counsel, but its application to this case was denied upon the ground that it did not appear upon the face of the will that the testatrix knew of the plaintiff's claim in the matter, or that she certainly intended to dispose of what was not her own. It is true there is a *prima facie* presumption, always, that a testator means only to dispose of what is his own, and what he has a right to give; and if it be at all doubtful, by the terms of his will, whether he had in fact a purpose to dispose of property really belonging to another, that doubt will govern the courts, so that the true owner, even though he should derive other benefits under the will, will not be driven to make an election. But if on the other hand there should be a manifest purpose expressed in the will to dispose of the thing itself, then it is wholly immaterial whether he should recognize it, or not, as belonging to another, or whether he should believe that the title and the right to dispose of it rested in himself or not.

In speaking of this very point, and in reply to a suggestion that a testator might have made a different disposition if he had been aware of the true state of the title, Lord Eldon declared in *Thelluson v. Woodford*, 13 Ves. 221, that the law was too plain, that no man should claim any benefit under a will without conforming and giving effect to every other provision contained therein, as far as lay in his power, and that the question whether the testator believed he had title to the property and the right to dispose of it, had nothing to do with the case; that the only question was, did he intend the property mentioned to go in the manner indicated, and not whether he had power so to direct it, or would have done so, if he had known that he thereby imposed a condition upon another; and he added, that nothing could be more dangerous than to speculate upon what a testator would or would not have done, if he had known one thing or another.

Again it is said, that according to the facts stated, the testatrix had a third interest in the house and lot, having expended that much of her own money in its purchase, and it is insisted that under such circumstances she will not be presumed to have intended to give more than she had a right to. This,

too, is a question of construction for the court, and the case of *Padbury v. Clark*, 2 Mac. and G. 298, seems to be directly in point, and to lay down the rule correctly. There, it was held that when a man who had an undivided moiety in a house devised it by a particular description, such as "my messuage or tenement with the garden thereunto belonging," the whole was intended to pass.

In *Miller v. Thurgood*, 33 Beav. 496, it is said there are many cases on the subject, but they all resolve themselves into this: "If a testator having an undivided interest in a particular property devises the same specifically, a case of election will arise and the co-owner must elect between his interest in the property and any other interest he may take under the will; and what was said in *Wilkinson v. Dent*, 6 L. Rep. is to the same effect.

In the will now under consideration, the testatrix not only describes the lot devised as that which she had purchased from its former owner, Humphrey, but specifically designates it by its number in the plan of the town; so that it is impossible to satisfy the terms of its description without supposing that she intended to pass the lot as an entirety.

In the opinion of this court, the plaintiff fails to set forth in his complaint facts sufficient to constitute a cause of action against the defendant, and, therefore, the judgment rendered in his behalf in the court below is reversed, and judgment will be entered here dismissing the action.

Error.

Judgment accordingly.

WALTER'S APPEAL.

[95 Pennsylvania St. 305.]

WHAT NECESSARY TO CREATE CHARGE ON LAND DEVISED.

In order to create a charge on land devised, there must be more than a bare direction to the devisees to pay money; it must appear by express words or by necessary implication from the whole will.

APPEAL from the Orphan's Court of Allegheny county.

The court below held the legacies in question were charged on the land devised.

W. D. Brandon, A. C. Johnston, T. C. Campbell, for appellant.

A. M. Brown and John S. Lambie, for appellees.

GREEN, J. In *Cable's Appeal*, 10 Norris, 327, we said: "It is well settled that a mere direction by a testator that a devisee shall pay a legacy does not thereby create a charge on land. There must be something more, express words or necessary implication from the whole will, that such was the intention." This same doctrine was held in a number of other cases of which *Okeson's Appeal*, 9 P. F. Smith, 99; *Hamilton v. Porter*, 13 Id. 332, and *Buchanan's Appeal*, 22 Id. 448, are examples. They have all been so recently reviewed that comment upon them is unnecessary. The force of these authorities is conceded by the learned counsel for the appellees, and they therefore argue that an intent to charge the legacies upon the lands devised to the testator's two sons, John M. and James H. Walter, is to be gathered from a reading of the whole will. We have examined it with much care and are entirely unable to discover such an intent. The testator first gives various pecuniary legacies to several of his children and to Harriet Kuhn. These legacies are payable by the executors out of such assets as may come into their hands. Then he devises his farm to his two sons, John M. and James H., to be equally divided between

them. He next directs as follows: "And further, I order and direct that my said son, John M. Walter, pay to my several before-mentioned heirs the sum of \$3,000, and I direct that my son, James H. Walter, pay to my several before-mentioned heirs the sum of \$1,400." And he follows this with a provision that his two sons shall come into possession of the farm when they respectively arrive at the age of twenty-one years. In all this there is not the least expression of any desire or thought that these sums are to be charged upon the land. The testator next provides that his widow shall have control of the farm until the two sons arrive at majority, that sufficient stock and farming implements remain upon the premises for farming purposes, and that all repairs be paid out of the proceeds of the farm. Next he directs the executors to make a public sale of all the effects not needed in furnishing the mansion house, and implements and live stock not needed for farming purposes, and that his said two sons shall have a reasonable education, to be paid for out of the proceeds of the farm and of the said public sale; and he further directs his said two sons to provide equally for the support and maintenance of his widow. In the next two clauses of the will the testator devises a piece of ground to a church for a burial place. In the final clause he directs that the bequests made to his children which are to be paid by his said two sons, are not to be for two years after his decease, and then to be paid in equal proportions, if they are not able to pay the whole at that time. He closes by naming his executors. The foregoing is an epitome of the whole will, and it fails entirely in our opinion to disclose the least evidence of an intent on the part of the testator to charge the lands devised to John and James with the payment of the sums in question. There is nothing but a bare direction to them to pay the money, and this has frequently been held to import nothing more than a personal obligation of the devisees. There is no residuary devise or bequest in the will, and hence there is no warrant for the proposition that John and James are to have the residue.

It is further contended that the Orphan's Court has jurisdiction to decree the payment of the legacy, whether it is

charged upon the land or not, and *Dundas' Appeal*, 23 P. F. Smith, 474, is cited as authority for that position. But, so far as this question is concerned, that was the case of an ordinary application to compel *executors* to pay legacies which it was their duty to pay. This proceeding is a special one against *devisees* of land to have certain legacies charged upon the land, and this can only be done under the act which authorizes it, when the legacy is, by the will of the testator, "charged or payable out of real estate." As that is not the case in this instance, it follows that there was no jurisdiction in the Orphan's Court to entertain the petition for any purpose.

Decree reversed and petition dismissed at the cost of the appellees.

What is necessary to constitute charge on land.—In England a long line of cases from the anonymous case in *Freeman* (Freem. Ch. Cas. 192) to the latest decisions in Chancery on the subject, held, with great strictness and uniformity, that a general direction by a testator that his debts shall be paid charges them upon his real estate. This doctrine is in derogation of the common law rule which was first relaxed in 47 Geo. III, c. 74, and in subsequent statutes. In *Shallcross v. Finder* (3 Ves. 739), the court says: "I am very clearly of the opinion that whenever a testator says that his debts shall be paid, that will override every disposition either against his heirs at law or devisees." This appears now to be settled law in England.

There are two principal exceptions to the rule. First, when a specific fund is provided by the will for the payment of debts, and second, when the testator directs the debts to be paid by the executors. *Hawkins v. Hughes*, 60 Ala. 316; *Harris v. Douglas*, 64 Ill. 466; *Gow v. Hoffman*, 12 Grattan, 628; *Monson v. Monson*, 8 Abb. N. C. 123; *Ex-parte Dickson*, 64 Ala. 188; *Steele v. Steele*, 64 Id. 438; *Caruthers v. McNeill*, 97 Ill. 256.

A mere direction that a devisee pay a certain sum will not make it a charge on the land where there is no express or implied intention to that effect in the will. *Wright v. Denn*, 10 Wheat. 204; *Hamilton v. Porter*, 63 Penn. St. 332; *Buchanan's Appeal*, 72 Penn. St. 448; *Houbest's Estate*, 11 Phila. (Pa.) 10; *Piper's Estate*, 11 Id. 141; *Power v. Davis*, 3 MacArthur (D. C.), 153; *Turner v. Turner*, 57 Miss. 775; *Talbott v. Rountree*, 3 Ill. App. 275.

Where there is any express or implied intent on the part of the testator not to charge his real estate, or the residue of the real estate, with the

payment of legacies, the courts will respect it, and debts and legacies do not by any means stand on the same footing. *Bevan v. Cooper*, 72 N. Y. 317; *Horning v. Wiederspallen*, 28 N. J. Eq. 387; *Martin v. Cullen*, 30 Id. 426; *Wright v. Dunn*, 6 Wheat. 229; *Seaver v. Lewis*, 14 Mass. 87; *Barch v. Barch*, 52 Ind. 136.

As to legacies there must be plain words in order to charge the real estate. Where a legacy is given and directed to be paid by the person to whom the real estate is devised such real estate is charged. *Brown v. Knapp*, 79 N. Y. 136.

As to debts, if there be anything in the terms of the direction to pay out of which an intention to charge the real estate may be inferred the court will seize upon it. Such an intention will be spelled out from a very slight suggestion, in order—as an old judge puts it—“that men may not sin in their graves.” *Fenwick v. Chapman*, 9 Pet. 461; *Green v. Green*, 69 N. C. 25. See also 67 Id. 135; *Quinby v. Frost*, 61 Me. 77; *Decker v. Decker*, 8 Ohio, 157; *Powers v. Powers*, 28 Wis. 659; *Bell v. Raymond*, 20 Conn. 838.

In *Bank of the U. S. v. Beverly* (1 How. U. S. 134), the court say: “It must therefore be taken to be a settled point that a disposition by a testator of his personal property to purposes other than the payment of his debts, with the assent of creditors, is in itself a charge on the real estate, subjecting it to the payment of the debts of the estate, though no such charge is created by the words of the will.”

For other instances of a slight expression of intent to charge the real estate being held sufficient so to do, see the following cases: *Wood v. Wood*, 26 Barb. 356; *Harris v. Fly*, 7 Paige, 421; *Gardenville Permanent Loan Ass. v. Walker*, 52 Md. 452; *Johnson v. Poulson*, 32 N. J. Eq. 890; *Siron v. Ruleman*, 32 Gratt. 215; *Stoddard v. Johnson*, 13 Hun, 606; *Merrill v. Bickford*, 65 Me. 118; *Pierce v. Livingston*, 80 Penn. St. 99; *Kirkpatrick v. Chesnut*, 5 S. C. 216.

In determining the intention of the testator, in the absence of an express direction charging legacies on the real estate, extraneous circumstances may be considered in aid of the terms of the will. *Hoyt v. Hoyt*, 85 N. Y. 142; s. c. 2 Am. Prob. R. 318.

WAGER vs. WAGER.

[89 New York, 161.]

JURISDICTION OF EQUITY TO COMPEL EXECUTOR'S ACCOUNTING,
AND TO CONSTRUER WILLS.

A court of equity has jurisdiction to call an executor to account and to construe wills whenever necessary to guide trustees, but it seems it may decline to act where complete relief can be obtained in the surrogate's court.

A person claiming an interest in the personalty as legatee or distributee may, when the executor claims such interest in his own right, sue him to settle the construction and validity of the will and to recover his share in the estate.

An heir at law or devisee, interested solely in the realty when there is no trust, cannot bring an equitable action to construe the will, although the rights of such parties will be settled where the court has jurisdiction of the suit of a person interested in the personalty.

APPEAL from a judgment of the general term of the Supreme Court in the fourth department affirming a judgment at special term in defendant's favor.

Action to construe the will of William Wager. The opinion states the facts.

J. & Q. Van Voorhis, for appellants.

E. A. Nash, for respondent.

RAPALLO, J. The plaintiffs are next of kin and heirs at law of William Wager, deceased, and claim to be entitled to share in his residuary estate which, as they allege, is undisposed of by his will. The defendant, Eliza H. Wager, is the widow and executrix of the testator, and has taken possession of all the property and estate which he had at the time of his death, and claims to hold and own the same in her own right, to the exclusion of the plaintiff and other heirs and next of kin, and claims that by said will the whole of said property and estate belongs to her as devisee and legatee, absolutely.

By the first clause of the will the testator bequeaths to his wife \$4,000, "to have the use and control of the said sum of

\$4,000 during the term of her natural life, and in case the interest of the said \$4,000 shall not be sufficient to support and maintain her, then she is to have the privilege and the right to use so much, from time to time, of the principal of the said \$4,000 as she shall deem sufficient to support and make her comfortable," and said bequest is to be in lieu of dower.

By the second clause the testator devises and bequeaths to his daughter Susie E. Wager all the remainder of his real and personal estate, and also whatever amount shall remain or be left by his said wife, at her death, of the said sum of \$4,000.

Then follows the provision upon which the present controversy arises, which is in the following words: "But in case my daughter, Susie E. Wager, shall die leaving no issue, before the death of my wife, then in that case all the property, both real and personal, *that shall be left by my daughter at her death which shall belong to me at my death*, I give, together with what shall remain from the above-mentioned \$4,000, devise and bequeath to my beloved wife Eliza H. Wager, to her use, her heirs and assigns forever."

The testator's daughter Susie died three days before the testator, and the plaintiffs contend that the residuary bequest to her, lapsed by her death, and that the bequest in remainder to the widow did not take effect, such bequest being of all the property, etc., "that shall be left by my daughter at her death which shall belong to me at my death." That consequently the testator died intestate as to all but the \$4,000 given to his widow, and the residue descended to his heirs and next of kin. The widow, on the other hand, claims that the terms of the bequest of the residue are sufficient to entitle her to take.

The testator left real estate of the value of about \$2,000, and personal estate to the amount of about \$10,000. All his heirs and next of kin are parties to the action, and the plaintiffs ask judgment construing the will, and that it be determined whether, under the provisions thereof, the widow is entitled to all the estate of the testator, or whether all but the \$4,000 should be distributed according to law, and for such other or further relief or judgment as may be proper.

If the court should sustain the construction claimed by the

plaintiffs, it could undoubtedly, under this complaint, require the executrix to account for the personal estate in this action or remit the parties to the ordinary proceedings in the proper surrogate's court for an accounting.

The complaint was dismissed in the court below on the sole ground, as stated in the conclusion of law of the trial judge, that the court had not jurisdiction to declare and adjudge the construction of the will of said William Wager, deceased, in this action.

This conclusion cannot, in our judgment, be sustained. The defendant, Eliza H. Wager, has possession of all the personal estate left by the testator, and has the legal title thereto in her capacity as executrix. The object of this action is to fasten upon a portion of that property a trust in favor of the plaintiffs, and other next of kin, which trust is denied by the executrix, who claims absolutely and in her own right, the equitable as well as the legal title to the property. The jurisdiction of equity over trusts gives it authority to construe wills, whenever necessary to control or guide the action of a trustee, and there can be no clearer case for the exercise of that jurisdiction than where the trustee denies the existence of the trust, and claims the right to appropriate the trust property to his own use. An executor is always a trustee of the personal property of the testator and can be called upon to account therefor as such in a court of equity, even though no express trust be created by the will.

So far as the property is effectually disposed of by the will, the executor holds it in trust for the legatees or beneficiaries, and, according to the law of this country, if there is any part of such property or any interest therein not effectually disposed of by the will, he holds it in trust for those who are entitled to it under the statute of distributions. (*Bowers v. Smith*, 10 Paige, 193; 1 Williams on Executors, 294; 2 Story's Eq. Jur., § 1208; *Hays v. Jackson*, 6 Mass. 153.)

Any person claiming an interest in the personal estate of the testator, either as legatee under the will, or as entitled to it under the statute of distributions, may file a bill against the executors to settle the construction and ascertain the validity

of the provisions of the will, so far as the complainant's interest is concerned, and to enable him to obtain from the executors such portions of the estate as he is either legally or equitably entitled to. (*Bowers v. Smith*, 10 Paige, 200.) As all trusts are the peculiar objects of equitable cognizance, courts of equity will compel the executor to perform his testamentary trusts with propriety. Hence, although in those courts, as well as in courts of law, the seal of the court of probate is conclusive evidence of the *factum* of a will, an equitable jurisdiction has arisen of construing the will in order to enforce a proper performance of the trusts of the executor. The courts of equity are consequently sometimes called courts of construction in contradistinction to the courts of probate. (1 Williams on Ex. 294; *Hayes v. Hayes*, 48 N. H. 219; Redfield on Wills, 495.)

There is no more common instance of the interposition of the court of chancery in England to construe wills of personal estate and declare an executor to hold as trustee, than the very case now before us; that is, where an executor claims to take the residuary estate in his own right, in hostility to the claims of the next of kin. By the English law executors take beneficially as well as nominally, all the personal estate not effectually disposed of by the will, where there is nothing in the will to the contrary, but courts of equity lay hold of any circumstances which may rebut the presumption of such a gift to the executor, and the books are full of cases where equity has interposed to construe the will in this respect, many of which cases are very analogous to the present one. In *Bishop of Cloyne v. Young*, 2 Ves. Sr. 91, the testator, after making various legacies, gave and bequeathed the remainder of his estate, real and personal, without saying to whom. The executors claimed it and the next of kin filed a bill to have them declared trustees of the residue for their benefit, and it was so decreed by Lord Hardwicke. In *Lord North v. Purdon*, 2 Ves. Sr. 495, the testatrix gave all her property to M. L., to be paid to her at twenty-one or marriage, whichever should first happen, or in case she died before twenty-one or marriage, then to blank, and appointed the defendants executors. She died

before twenty-one, unmarried, and the plaintiffs as next of kin of the testatrix claimed that a trust should be declared in their favor, and it was so decreed, the master of the rolls construing the will both as to the vesting of the legacy and the intention that the executors should not take. *Nicholls v. Crisp*, Ambler, 769, was a case like the present one. The bequest of the residuary estate lapsed by the death of the residuary legatee in the lifetime of the testator, and the question was presented by the next of kin to the court of chancery, who decided in favor of the next of kin. *Bennet v. Batchelor*, 3 Bro. Ch., was a similar case of a lapsed legacy, and the executors on a bill filed against them by the next of kin were decreed to hold as trustees. *Hornsby v. Finch*, 2 Ves. Ch. 78, was also a bill filed by next of kin against executors where the residue was unbequeathed. There was a specific legacy to the executor, and the court construed the will as evincing an intention that the executor should not have the residue, and decreed him trustee for the next of kin.

There can be no doubt of the jurisdiction of a court of equity to entertain such an action. Where complete relief can be obtained in the surrogate's court, a court of equity may, in its discretion, decline, on that ground, to entertain an action for an accounting or other relief against executors, but the proposition that the court has no jurisdiction in such a case cannot be sustained. The rule is different in respect to real estate. An heir at law or devisee who claims a mere legal estate in real property, where there is no trust, cannot come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will and thus determining the title to the real estate; for the decision of such legal questions belongs exclusively to courts of law, unless a court of equity has obtained jurisdiction of the case for some other purpose. (*Bowers v. Smith*, 10 Paige, 193; *Post v. Hover*, 33 N. Y. 602.) If the court has obtained jurisdiction for the purpose of establishing the equitable right of the next of kin to the personal estate, that carries with it jurisdiction to adjust the whole controversy. (10 Paige, 200.)

The case of *Chipman v. Montgomery*, 63 N. Y. 221, was

decided on different grounds. The plaintiffs there had, on their own showing, no present interest in the property, and might never have any. There were many other reasons for dismissing the complaint in that action, and the case was entirely different from the present one.

As the court below declined to entertain the case, and has given no construction to the will, there is no actual determination of the general term on that subject to be reviewed. For this reason we do not consider that branch of the case properly before us at the present time, but leave it to be considered in the first instance by the Supreme Court.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur, except MILLER, J., absent.

Judgment reversed.

CANEDY *vs.* JONES.

[19 South Carolina, 297.]

DEVISE FOR LIFE OR IN FEE.—POWER OF DISPOSAL.

A gift from testator to his daughter of "all my real and personal estate of every description, and all the money due to me, to use and dispose of as she may think proper during her natural life, provided she maintains and supports her mother decently during her life," conveys an absolute estate in fee.

THE facts appear in the opinion.

Holmes & Simpson, for appellants.

J. W. Ferguson, opposed.

MOLVER, J. These two cases, resting upon the same facts and involving the same legal principles, were heard together

on circuit, and were heard and will be considered together here.

The plaintiffs, as heirs at law of William Canedy, deceased, seek to recover two tracts of land—one in the possession of defendant Jones, and the other in the possession of the defendant Riddle—which had been conveyed to them by Nancy Canedy upon the theory that she had only a life-estate therein, and that upon her death (which occurred prior to the commencement of these actions), the tracts of land in question reverted to the heirs at law of said William Canedy. It was conceded that the land belonged to William Canedy at the time of his death, and that he died leaving a will, of which the following is a copy: "In the name of God Amen I William Canedy * * * being desirous to dispose of all such worldly estate as it hath pleased God to bless me with do make and ordain this my last will in manner following I desire that all my just debts and funeral expenses be paid then I give to my daughter Nancy Canedy all my real and personal estate of every description and all the money due me to use and dispose of as she may think proper during her natural life provided she maintains and supports her mother Elizabeth Canedy decently during her life and lastly I do constitute and appoint my daughter Nancy Canedy executrix of this my last will and testament hereby revoking all other and former wills and testaments by me heretofore made."

The questions made turn upon the proper construction of this will. The circuit judge held that the will conferred only a life-estate upon Nancy, and that upon her death the estate reverted to the heirs of the testator; but that Nancy, being one of the heirs, her share became vested in her alienees, the defendants, Jones and Riddle; and, therefore, that it was a proper case for partition. He therefore granted orders for the purpose of carrying into effect that view.

The defendants, Jones and Riddle, make three points by this appeal: 1. That by a proper construction of the will of William Canedy, his daughter Nancy took an estate in fee and not a life-estate merely. 2. That if she took only a life-estate, yet she took such estate with power to dispose of the property ab-

solutely ; and that having exercised the power by conveying to Jones and Riddle the land in question, they took absolute estates therein. 3. That the plaintiffs having failed to make out the case as stated in their complaint, which were not framed with a view to partition, the complaints should have been dismissed, and it was error to order partition.

First, then, as to the nature of the estate which Nancy Canedy took under a proper construction of the will. The cardinal rule in construing a will is to look for the intention of the testator as expressed in the words of the will. With this view, let us examine carefully the terms used by the testator in this case. In the first place, it must be obvious, even to the casual reader, that the work is not artistically drawn, but is the work of one not familiar with the drawing of such papers. It is embraced in a single sentence, and counsel on both sides state in their argument that it is without punctuation marks of any kind, though the copy set out in the "Case" does exhibit such marks. We may naturally expect, therefore, to find that the testator has expressed his intention in loose and inaccurate language ; and what is most likely in such cases, that the testator would, in the effort to express his meaning, employ more words than were necessary, and, by needless repetition, raise doubts as to what was his real intention.

The next thing that must strike every one upon reading this will is, that it was the intention of the testator to dispose of his entire estate ; and that he did not intend to die intestate as to any portion of it. This is clear from the language used in the introductory part of the will, "being desirous to dispose of all such worldly estate as it has pleased God to bless me with." This being so, in order to avoid an intestacy which the testator did not intend, and to make the will operate as a disposition of his entire estate which he did intend, it would be necessary to construe the devise to Nancy as creating an estate in fee instead of a life-estate only. But this is not all ; the declared purpose of the testator being to dispose of all his estate, that purpose would be entirely defeated by construing the devise to Nancy as a life-estate, for there is no remainder and no residuary clause in the will, and the result would be

that instead of disposing of all his estate, a large portion, perhaps the most valuable portion, of it would be left entirely undisposed of.

Again, the use of the word "estate" implies a fee, for, as is said in 2 Jarm. Wills, 132: "It has been long established that a devise of the testator's estate includes not only the *corpus* of the property but the whole of his interest therein;" and this doctrine has been recognized in at least two of our own cases, *Fraser v. Hamilton*, 2 Desaus. 573, and *Cruger v. Heyward*, Id. 422. It being conceded that the testator owned the lands in fee-simple, when he gave all his estate to his daughter, he must be considered upon the authorities above cited to have given the fee to her.

Again, the fact that the estate which he gave to Nancy was charged with the support of her mother, is a strong indication that he intended Nancy to take an absolute estate and not an estate for life merely; for such an estate might not have proved to be of sufficient value to provide for what seemed to be the primary object of the testator—the comfortable support of his widow. Indeed, if the widow survived Nancy, which was not by any means impossible, then, if the latter took only a life-estate, the scheme which the testator had provided to effect what is conceded to have been his primary object, would have been defeated. True, in such a case, the widow would have been entitled to one-third of the estate; but that was not the provision which he manifestly intended for her; and it was for him to judge; and he had seen fit to provide that his entire estate should be charged with her support. We are satisfied, therefore, that, looking at the will as a whole, the testator intended, by the words he used, to give to his daughter Nancy an estate in fee-simple and not a life-estate merely.

Is there anything in the will which imperatively demands that we should place a different construction upon the terms of this will, and thereby defeat what seems to us, from the circumstances above mentioned, to have been in the mind of the testator when he penned his will? It is not sufficient for this purpose that we should find expressions in the will which would

render the construction demanded by the general scope of the will doubtful ; for, as was said by DeSaussure, chancellor, in *Waring v. Middleton*, 3 Desaus. 251 : "It is common, in cases of wills in which there is a clause in the beginning of the will declaring an intention to dispose of the whole of the estate—to infer from thence that, as the testator avowedly did not mean to die intestate of any part of the estate, the devise, even of a doubtful nature, should be construed favorably to extend the estate and give a fee-simple to the devisees, because a contrary construction would tend (where there was no residuary clause) to produce an intestacy as to some part of the estate against the express declaration of intent by the testator."

It will be observed that the estate was not given to Nancy for and during the term of her natural life in express terms, as would strike any one, even the most ignorant and inexperienced, as the most natural way of expressing an intention to create a life-estate, but the language used is : "I give to my daughter Nancy Canedy all my real and personal estate of every description and all the money due me to use and dispose of as she may think proper during her natural life provided she maintains and supports her mother Elizabeth Canedy decently during her life." So that the question is whether the words, "during her natural life," relied upon to cut down Nancy's estate to one for life only, in the connection in which they are found, imperatively demand that we should override what we have seen to be the intent of the testator from the circumstances above referred to ?

The words relied upon do not follow the words of gift to Nancy, as it would seem natural that they should do if the intention in using them was to qualify what would, without those words, unquestionably be a gift of the absolute estate, but they follow the words empowering her to use and dispose of the property, and, therefore, there is at least a doubt as to which member of the sentence they were intended to qualify. It may be true, as a general rule, that such qualifying words will apply to all the different members of the sentence to which they are annexed, and are not to be limited to that

member of the sentence immediately preceding such words, but where, as in this case, there are other terms in the will which demand a different construction from that which would result from applying the qualifying words to the entire sentence, then they must be confined to that member of the sentence which immediately precedes the qualifying words; and this results from the well settled rule that a will must be so construed as a whole as to give effect to every part, if possible.

It is argued that if the will had not contained the words "during her natural life," there would have been no doubt that Nancy would have taken an estate in fee, and that these words must have been inserted for some purpose, and that the only purpose in inserting them was to limit the estate which the previous words would have created. There would be very great force in this view if it were not possible to conceive of any other purpose in inserting the words in question. But is that so? Bearing in mind, as we must do throughout this discussion, that we are undertaking to construe the language of one who was manifestly not capable of expressing his intentions in apt and proper words, and that, as we have seen, there are the strongest indications in the other parts of the will that the testator intended to give to his daughter an estate in fee, let us inquire whether the words in question could not have been used for some other purpose than that of cutting down the estate to a mere life-estate. Might not the testator have supposed that, inasmuch as the estate he intended for his daughter was to be burdened with the charge of supporting her mother, she would not have the right to use and dispose of the same as she might think proper during her life, without special power so to do, and, therefore, these words were inserted for the purpose of giving her that power, provided she maintained and supported her mother? Or, might not the testator have supposed that some such provision was necessary to prevent his daughter from wasting the estate and thereby defeating his primary object—the support of his widow; and hence, the power of disposition was given to her during her life only, on the condition that she carried out the testator's main object by providing for

the support of the old lady? The location of the words in the sentence seem to point to some such conclusion, and, if so, then the insertion of the words in question cannot have the effect of cutting down the estate of Nancy to a life-estate.

It is very true that if the testator intended to give his daughter an estate in fee, there was no necessity to give her the power to use and dispose of it as she might think proper, as that would follow as a necessary incident to the estate created; but it very frequently happens that we find in a will drawn by one unskilled in the preparation of such documents, terms used which are wholly unnecessary to effect the object which the testator had in view. A striking instance of this is found in the will now under consideration, where the testator provides for the support of his widow "during her life," and when such unnecessary terms are found in a will they ought not to be allowed to defeat the manifest intent of the testator, as ascertained from an examination of the will as a whole, where it is possible to put such a construction upon those terms as will not conflict with such manifest intent, even though such construction may not be the one which such terms naturally and usually require.

We are, therefore, of opinion that under a proper construction of the will of William Canedy, his daughter, Nancy Canedy, took an estate in fee, and not a life-estate merely.

But, if it be assumed that Nancy Canedy took an estate for her life only, the next inquiry is whether she took such estate with power to dispose of the same absolutely, or only the power to dispose of it for the term of her natural life. As is said in Sugd. Pow. 459, cited with approval in *Fronty v. Fronty*, Bailey's Eq. 518: "In considering the extent of a power, the intention of the parties must be the guide." The question, then, is, what was the intention of the testator in conferring the power here in question upon his daughter? Was it simply to authorize her to sell the life-estate, or was it for the purpose of enabling her to make an absolute disposition of the property, if she thought proper to do so? In determining this question, it must be remembered that the property did not consist of land only, but it was all the real and personal property, of

every description whatsoever, which the testator owned ; and hence, if the power should be limited to the disposition of the life-estate only, then the devisee and legatee could not sell or dispose of any portion of the property absolutely. It can scarcely be supposed that the testator, in giving his entire estate to his daughter with the power to use and dispose of it as she might think proper, with the purpose, primarily, of providing a support for her mother, intended so to hamper it as to prevent his daughter from selling any greater interest than a life-estate in any portion of it, and thus materially decrease the means of accomplishing his primary object.

Again, if the estate given to the daughter was an estate for her life, there would have been no necessity whatever to invest her with power to dispose of such estate, for that she would have, as owner, without the empowering words ; and it is difficult, if not impossible, to conceive of any other reason for creating the power than that of enabling the life-tenant to make an absolute disposition of such portions of the estate as she might think proper to dispose of. As is said in Sugd. Pow. 458 : " A general power to a tenant for life to grant a term or estate, without specifying the duration of it, will enable him to grant a term beyond his own life, although it defeat the remainders over, for otherwise the power would be merely idle and void, as every tenant for life may alien the estate during his own life." Here the case is much stronger, as there is no remainder over to be defeated. We think it clear that, if the estate of Nancy should be construed to be a life-estate merely, then the effect of the power was to enable the life-tenant to dispose of the estate absolutely and not for her life only, provided she make such disposition " during her natural life."

The cases of *Smith v. Bell*, 6 Pet. 74 ; *Bryant v. Virginia Coal and Iron Company*, 93 U. S. 326 ; and *Boyd v. Strahan*, 36 Ill. 355, are relied upon by the respondents to support a contrary view as to the extent of the power here in question, are not, in our judgment, sufficient for that purpose. In the first place we must remember that while a decided case may aid us in ascertaining the rules of construction, unless it is in every re-

spect like the one under consideration, which rarely happens, it cannot be allowed to have a controlling effect, inasmuch as the object should be in every case to ascertain the intention of the testator from the words which he had used, and unless the language to be construed is identical in both cases, the authority cited, though it may aid us in reaching a proper conclusion, cannot be regarded as absolutely controlling.

In *Smith v. Bell*, the only question made was as to the nature of the estate created—whether a fee or a life-estate merely—and there was no question raised as to the extent of the power. Therefore all that was said upon the subject was *obiter dicta*, and, though entitled to great consideration, is not authoritative. In that case, too, there was a remainder over, a very material matter, and was the principal ground upon which the decision was rested. But here there is no remainder over, nor is there a residuary clause.

In *Bryant v. Virginia Coal and Iron Company*, the words of the will were: "I give * * * to my wife, Nancy Sinclair, all my estate, * * * to have and to hold during her life, and to do with as she sees proper before her death"—very different from the words used in Canedy's will. The words used were the apt and technical words by which a life-estate is created, and there could be no doubt as to the nature of the estate which the wife took. So, too, the empowering words were different from those used in the case now in hand. The wife was given a life-estate in express terms, and it was that which she was authorized "to do with as she sees proper before her death," and therefore she could only dispose of the life-estate. But here the estate is given to Nancy Canedy in terms which would carry the fee, and then follow the empowering words.

In *Boyd v. Strahan*, there were two clauses in the will, in one of which the testator gave to his wife certain property absolutely, and in the other he gave her certain other property "to be at her own disposal, and for her own proper use and benefit during her natural life." The decision seems to have turned upon the fact that there were two clauses in which the testator used different language, thereby showing an intent to draw a distinction, and that by the letter he only intended

his wife to take a life-estate with only the incidents of such estate.

If, then, the estate given to Nancy be regarded as a life-estate, with power during her life to dispose of the same absolutely, the exercise of such power in conveying the land in question to the appellants, Jones and Riddle, conferred upon them the fee. (*Pulliam v. Byrd*, 2 Strobb. Eq. 142; *Scott v. Burt*, 9 Rich. Eq. 360, and the authorities cited in those cases.) And such being the case, it is clear that the actions in these cases cannot be sustained, and the complaints should have been dismissed.

The judgment of this court is that the judgment of the Circuit Court in both of the cases above stated be reversed, and that the complaint be dismissed.

HUSTON vs. CROOK.

[38 Ohio State, 328.]

WORD "HEIRS" MAY INCLUDE "GRANDCHILDREN."

Where testator first gave specific legacies to his children and grandchildren, and then directed his personal estate to be equally divided between his "aforesaid heirs," the grandchildren share equally with the children.

ACTION to construe the will of Thomas Crook.

The opinion states the case.

D. Thew Wright and *W. C. Howard*, for plaintiffs in error.

Warren Munger, for defendants in error.

JOHNSON, J. By the 14th and 15th items of his will, the testator directs that the proceeds of his personal estate be divided, "equally, share and share alike, between all my aforesaid heirs." At the time these words were used and when the

will took effect, he had children, and three grandchildren, the heirs of a deceased daughter. In the preceding clauses of the will, these children and grandchildren were each named, and he gave to each a specific legacy.

None of these were *heirs* in the strict legal sense, as he was then living, but each was an heir apparent, and each would have been an heir, had he died intestate. Hence the phrase, "all my aforesaid heirs," was used to expressly include all such as were in fact heirs apparent. These residuary clauses of the will, did not direct a division among "all his children," or "all his sons and daughters" but "between *all his aforesaid heirs*." There is nothing found elsewhere in the provisions of this will, to warrant us in limiting this comprehensive expression to part only of his heirs. To hold that this phrase includes some of the heirs and excludes others, would do violence to the well-settled rule of construction, that the intention of the testator must be discovered from the words used, in connection with the other provisions of the will. The explicit direction that this division should be made "equally, share and share alike," entitles these grandchildren to take *per capita*, and not *per stirpes*. Had this direction as to equality been omitted, a different result might have been reached in accordance with the judgment of the District Court, and in harmony with numerous well-considered cases, but the testator has left nothing for construction on this point. Each is to have an equal share. (*Dagget v. Slack*, 8 Met. 450; *Downing v. Smith*, 3 Beav. 541; *Lord v. Moore*, 20 Conn. 122; *Tuttle v. Pints*, 68 N. C. 543; *Vannorshall v. VanDeventer*, 51 Barb. 348; *Harris v. Philpot*, 5 Ired. Eq. 323; *Nutter v. Vickery*, 64 Maine, 490; *Lemacks v. Glover*, 1 Rich. Eq. 141; *Witmer v. Ebersole*, 5 Pa. St. 458; *Campbell v. Wiggins*, Rice's Eq. [S. C.] 10; *Ort's Appeal*, 25 Pa. St. 267.)

Judgment accordingly.

POST vs. MASON.

[91 New York, 539.]

PRESUMPTION OF UNDUE INFLUENCE FROM LEGACY TO DRAUGHTSMAN.—PROBATE OF WILL OF PERSONALTY CONCLUSIVE AS TO FRAUD OR UNDUE INFLUENCE.

A will executed by one having full testamentary capacity, is not, as matter of law, fraudulent for the simple reason that it contains a provision in favor of the draughtsman, who was and had been testator's counsel.

The probate of a will of personalty is conclusive, and a court of equity has no jurisdiction to set the same aside because of fraud or undue influence, nor to charge the executors of such a will, as to a gift to them therein as trustees of the next of kin, on the ground that such gift was obtained by fraud.

APPEAL from a judgment of the general term of the Supreme Court in the fourth department affirming a judgment at special term in defendant's favor.

The opinion states the facts.

William F. Cogswell, for appellants.

George B. Bradley, for respondents.

DANFORTH, J. John Post made his will on the 13th day of September, 1874, and thereby, after giving to each child \$40,000, to his wife the use for life of \$40,000, and the homestead, with remainder to his children, \$20,000 to the Ontario Orphan Asylum, to a nephew \$3,000, smaller sums to his brother, to a clergyman and others, to his wife's mother for life a certain house and lot, with remainder to his heirs, provided for the improvement of his father's burial place and the erection of certain monuments, and then appointed Alonzo Wynkoop and Bradley Wynkoop, both his cousins, and Francis O. Mason, his executors and trustees for certain purposes, and gave to them in equal shares the remainder of his estate, amounting, as it now appears, to \$17,513 66 personal property.

He died on the 28th of September, 1874, leaving an estate of the value of about \$200,000, and on the 24th of October, 1874, probate of the will was duly granted by the surrogate of Ontario county. This action was commenced in May, 1878, by the plaintiffs, as the widow, heirs, and next of kin of the testator, against the defendants, as executors and residuary legatees, praying that the probate of the alleged will be vacated, that the instrument be declared not to be the last will and testament of John Post, or, failing in these respects, that the plaintiffs be declared to be the owners of the residuary estate, and the defendants adjudged to hold the same as trustees for them.

The defendants, by answer, put in issue the case made by the complaint, and questions framed thereon were, on submission to the jury, answered by them in favor of the defendants. The plaintiffs then applied to the special term for a new trial upon exceptions taken to the charge of the trial judge, and his refusal to charge as requested by their counsel. This was denied. The court, thereupon, approved the verdict, and after findings of fact and law, on all points adversely to the plaintiffs' case, ordered judgment, dismissing the complaint.

We find no error in that decision. *First*, as to the charge: so far as material to the proposition argued by counsel, the complaint alleged that Mason was a lawyer, and at the death of the testator, and for one or more years before that time, his friend and confidential attorney and counselor; that he wrote the will in question, and taking advantage of that relation, "improperly and illegally, if not fraudulently, induced" the testator to execute it in ignorance of its contents and effect; that the instrument was never read over to him, and he was never fully informed of its contents; that its probate was fraudulently procured at a time when the children were under the age of twenty-one years, and the widow uninformed of its contents. The answer of the defendants puts in issue every allegation tending to exhibit fraud or contrivance either as concerned the will or its probate, and in the most satisfactory manner details the various consultations which led to the will, and the intelligent instructions given by the testator for its

preparation. Omitting immaterial questions, those framed for the jury were: *Fourth*, Was John Post, at the time he made and executed the will, of sound and disposing mind and memory, and competent to make and execute it? *Fifth*, Was it read over by or to him at the time of, or before its execution, and did he understand it and all its provisions? *Sixth*, Was its execution procured by undue influence? *Seventh*, Was the probate fraudulently obtained? *Eighth*, Was the plaintiff, Adelaide, informed of the contents of the will, and if so, when? *Ninth*, Did either of the defendants intentionally prevent either of the plaintiffs from becoming informed of the contents of the will? Upon the trial of these questions before the jury, it was conceded that the signature to the will was that of the testator; that the statutory formalities relating to its execution were complied with, and that it was admitted to probate at the time above stated. Witnesses were examined by the plaintiffs to establish, on their part, the questions in issue. They were answered by the defendants. In his charge to the jury the learned judge dwelt upon each proposition involved, in a manner satisfactory to the plaintiffs, except as I shall hereafter state. Upon the question of undue influence he said, upon the relation of client and counsel, "The law fastens a peculiar confidence," and all that is necessary to make the influence of the latter undue is that "they should use the confidence reposed in them, unfairly and dishonestly to operate as a moral coercion upon the testator, and thus induce him to do what he otherwise would not have done." "The law," he said, "treats the exercising of this unfair influence as a fraud, but the law does not presume that a fraud has been committed in this or any other case. If a man clear in his mind, and competent to understand things, makes his will, the mere fact that he gives a legacy to the counsel who draws it does not invalidate the will at all." "It has this effect, however, if there is any evidence produced, tending to establish the fact that there was this undue influence, the law looks with more jealousy upon it than in other cases, it requires less evidence to find undue influence, when the will gives a legacy to the counsel, than if it was between persons not holding the relation I have adverted to."

He added, "It is incumbent upon the plaintiffs in this case to prove some circumstances of suspicion, some evidence of an unfair exercise of the influence which Mr. Mason had over the testator, and if they have furnished such evidence it is incumbent upon the defendants to show you some evidence that no undue influence was exercised." To this clause the plaintiffs' counsel excepted, and asked the court to charge: "That this will having been written by Mr. Mason, who is a legatee, and is shown to have been for years before the will was made the legal adviser of Mr. Post, the same is presumed to be fraudulent; that the law itself, without any evidence at all, presumes that it was obtained by fraud; that the presumption was against the will until it was overborne by satisfactory evidence." The court declined, and the plaintiffs excepted. These exceptions are to be considered together, and they present the question whether a will executed by one having full testamentary capacity is, as matter of law, to be deemed fraudulent for the simple reason that it contains a provision in favor of the draughtsman who was and had been the counsel of the testator. This is apparent when we read the charge and the request together. The court said: "If a man, clear in his mind, and competent to understand things, makes his will, the mere fact that he gives a legacy to the counsel who draws it does not invalidate the will," and on the other hand, the appellant says: "The law itself, without any evidence at all, presumes it was obtained by fraud."

In *Hindson v. Weatherill* (5 De Gex, M. & G. 301), there is a case somewhat similar in its facts, and as viewed by the court, presenting the same question. The plaintiff succeeded before the vice-chancellor, on the ground that a solicitor of a testator, to whom the testator had made gifts, was a trustee of those gifts for the testator's heir of law and next of kin, but upon appeal the court thought otherwise, and deemed it unnecessary to say how the matter would have stood if undue influence or any unfair dealing had been established against him, for no such thing was done. The solicitor, they say, "prepared his client's will, containing dispositions in his own favor," adding, "there begins and ends the case as I view it."

But a case so beginning and so ending does not take away the right, either legally or equitably, of a solicitor to be, for his own benefit, a devisee or legatee." This touches 'the very point as presented to the trial judge, and to the same effect are *Coffin v. Coffin* (23 N. Y. 9), and *Newsen v. Newsen* (2 Keyes, 229). The proposition of the plaintiff excluded every circumstance but the occupation of the legatee, Mason, and his relation to the testator and the will. If acceded to it would have taken from the jury even the contents of that instrument, forbidden them to inquire whether the testator himself knew its provisions, or to consider the amount of the legacy, its proportion to the whole body of the estate, its relation to bequests to other parties, and those persons who were the natural objects of the testator's bounty, and other circumstances which had been detailed in evidence. I do not think it necessary to inquire whether such rule might apply to a controversy between an attorney and his client, where the former was seeking to enforce an obligation against the latter, or to an issue made upon the probate of a will under which the attorney was the principal beneficiary. There is certainly no rule of law which says an attorney shall not buy of, or contract with his client; there is only the doctrine that if a transaction of that kind is challenged in proper time, a court of equity will examine into it, and throw upon the attorney the *onus* of proving that the bargain is, generally speaking, as good as any that could have been obtained from any other purchaser, or, in other words, that the bargain was a fair one. Then as to testamentary dispositions, as one does not, by becoming an attorney, lose the capacity to contract, neither is he thereby rendered incapable of taking as legatee, even under a will drawn by himself. That circumstance, if probate was opposed, might in some cases require something more than the usual formal proof of a due execution of the instrument, not because fraud was presumed, but because it might be rendered more probable than in cases where the directions of the testator followed the lines of relationship. *Coffin v. Coffin* and *Newsen v. Newsen* (*supra*), go no further. In the first, the fact that the draughtsman of the will was appointed executor and legatee was said to be suspicious only in

connection with other circumstances indicative of fraud or undue influence, and in the other, although from an estate of \$15,000, the draughtsman of the will, who was also the testator's agent, was appointed to receive all but \$3,000, and so became the principal beneficiary under it, the court, citing *Coffin v. Coffin* (*supra*), held the same way. Both cases came up on appeal from surrogates' decisions on proceedings for probate, and require from the proponent in such a case testimony of a clear and satisfactory character. In *Coffin v. Coffin*, the court sum up the matter in the language of Baron Parke, in *Barry v. Butlin* (1 Curteis' Ecc. 637), and declare that "all that can be truly said is, that if the person, whether an attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight, according to the facts of each particular case, in some of no weight at all * * * * * varying according to circumstances, for instance the *quantum* of the legacy, the proportion it bears to the property disposed of, and numerous other contingencies."

The relation of attorney and draughtsman no doubt gave in the case before us the opportunity for influence, and self-interest might supply a motive to unduly exert it, but its exercise cannot be presumed in aid of those who seek to overthrow a will already established by the judgment of a competent tribunal, rendered in proceedings to which the plaintiffs were themselves parties, nor in the absence of evidence, warrant a presumption that the intention of the testator was improperly, much less fraudulently controlled. Such indeed seems to have been the theory on which the action was brought, for the complaint not only alleges the confidential relation between Mason and the testator, but avers weakness and inability on his part, ignorance of the contents of the will, and advantage taken of these circumstances by the attorney to procure a bequest for his own benefit. In view, therefore, of the verdict of the jury and the findings of the court, we might dismiss the case. They have not only declared that the testator was of sound and disposing mind, competent to make a will and under no restraint or undue influence, but that before execution the will

was read and its provisions understood by him, and also that fraud was not practiced upon the testator nor upon the plaintiffs, to obtain probate, and have thus taken away every ground of relief, even if the Supreme Court had power to grant it. A somewhat more general question has, however, been argued for the appellants. The learned counsel insists that "the burden of proof is all there is of this controversy," and as the judge charged the jury that upon all the questions presented to them, "the plaintiffs held the affirmative," and again, that "the burden of proof is upon the plaintiffs to establish, by evidence, every allegation of fraud, and in the absence of such evidence, the issue must be found in favor of the defendants," there was error. Several propositions were thus involved. The questions submitted to the jury related severally to the condition of mind of the testator, influence exerted upon him, whether probate was obtained by fraud, whether Mrs. Post learned the contents of the will within a given time, and whether either, and if either, which of the defendants prevented her from so doing. Upon some of these there could be no doubt whatever as to the burden of proof. The plaintiffs' moving to set aside the will and its probate must do something more than call the defendants into court, and so they thought at the trial. For they opened the case to the jury, and upon every question took the affirmative, giving such evidence as they could. Even assuming, therefore, that the exceptions were pointed enough to call the mind of the judge to any particular error, we think his instructions were right. But if otherwise, it would not follow that our decision should go for the appellants. Applications for new trials of questions submitted by a court of equity are governed by different principles from those which prevail on similar applications in a court of law. The object of the trial is attained, when the court is satisfied that justice has been done, and in such a case a new trial will not be granted, even for misdirection to the jury (*Head v. Head*, 1 Turner & Russell, 138), unless the error was vital or important. (*Vermilyea v. Palmer*, 52 N. Y. 471.) There are many cases to the same effect, but in this State the rule is now statutory, and any error in the ruling or direction of the judge upon the trial

may, in the discretion of the court which reviews it, be disregarded, if it "is of opinion that substantial justice does not require that a new trial should be granted. (Code of Civil Procedure, § 1003.) Upon this point neither the judge at special term nor the judges of general term have entertained a doubt. Neither can we. Upon the question of fraud or undue influence, there is no evidence. The plaintiffs' case stands, if at all, upon the single fact that a lawyer, the draughtsman of the will, was one of three residuary legatees, and thus receives a benefit. The proof is abundant that on the part of the testator there was adequate capacity, testamentary intention, and a due execution of the will, with full knowledge of its contents. This is enough. The record furnishes no reason for defeating the plain wishes of the testator. Aside from these considerations, however, it is apparent that so far as any question here is concerned, the will is to be regarded as one relating to personal property only, and we are of opinion that its probate by the surrogate must be deemed conclusive. As to this the statute is explicit. (2 R. S. tit. 1, part 2, chap. 6, art. 2, § 29, p. 61; *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190; *In the Matter of Proving the Will of Kellum*, 50 Id. 298.)

It is, however, urged as ground for the interference of a court of equity, notwithstanding probate of the will, that the executors may, as to the gift to them, be charged as trustees for the next of kin, if that gift was obtained by fraud, actual or constructive. Although the foundation for this contention is taken away by the decision of the other points, something should be said as to the proposition itself. Authority for it is not gathered from the decisions of the courts of this State, nor are we informed how it can stand in face of the statute (*supra*) which make such probate conclusive. The whole, and each part of the will was before the surrogate, and allegations attributing any portion of it or any of its provisions to fraudulent practices, were then competent. They were made or might have been made, and in either event were embraced in his decision. If established, the will, or so much of it as was affected by the fraud, would have been rejected, and the property now claimed would have found its way by force of the

statute of distributions to those entitled to it. We are, however, referred by the appellants' counsel to cases from the English courts, in support of his position. We think they are insufficient. Most of them (*Marriot v. Marriot*, 1 Str. 666; *Segrave v. Kirwan*, 1 Beatty, 157; *Bulkley v. Wilford*, 2 Clark & Fin. 102; *Barnesly v. Powel*, 1 Ves. Sr. 287) are cited and commented on in *Allen v. McPherson* (1 House of Lords Cases, 191), where, after probate of a will and codicils in the Ecclesiastical Court, a bill was filed by one R. A. in chancery, stating that by the will and codicils the testator gave him large bequests which he revoked by the final codicil, and alleged that the testator had executed the last codicil when his faculties were impaired by age and disease, and under undue influence of the residuary legatee, and false representations respecting R. A.'s character, and moreover that he had not been permitted in the Ecclesiastical Court to take any objections to that codicil, except such as affected the validity of the whole instrument, and prayed that the executor or residuary legatee might be declared trustees or trustee to the amount of the revoked bequest. Upon demurrer, the court, with these and other cases before it, held that the Court of Chancery had no jurisdiction in the matter, and this was upon the ground that the Ecclesiastical Court had jurisdiction and might have refused probate, citing various instances where those courts had so applied the doctrine, and as to cases in which a court of equity had declared a legatee or executor to be a trustee for other persons, show that they presented questions of construction, or were cases in which the party had been named a trustee, or had engaged to take as such, or in which the Court of Probate could afford no adequate remedy, and were not cases of fraud. This decision was made in 1847, and in a much later case (*Meluish v. Milton*, L. R. 3 Ch. Div. 27, decided in 1876), it was followed by the Court of Chancery, where the heir at law and next of kin sought to have the executrix, who was also legatee, declared a trustee of the property for him. The relief sought was denied upon the ground that as the Court of Chancery could not set aside probate of a will of personal property, it could not make a legatee trustee for another person, on the

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ound of fraud, as that would be doing indirectly what the court will not allow to be done directly, and the court held that the exclusive jurisdiction of the Court of Probate in such cases is supported by convenience as well as by authority. So there is no objection to the English cases where, as the law stood, if a testator did not dispose of his residuary estate, the executors took a beneficial interest in it unless a contrary intention was expressed, and a court of equity was astute to find a trust for the heir or next of kin. *Sydney v. Ainsworth* (1 Beatty, 157), so largely relied on by the appellants, was one of those cases. It was not there intended that the testator should give the draughtsman anything more than the office of executor, but no residuary legatee was named, and he insisted that he was entitled to the residue of the personal estate, and so the law was. But it appeared that at the time he drew the will he was not—nor was the testator—aware that under the dispositions and omissions of the will, he would be entitled to the residue; and the court charged the executor as trustee for the next of kin, upon the ground that he should be deemed to have known the law, and having failed to make provision for the testator in regard to it, should reap no advantage from his actual ignorance. But even in England the necessity for this interference was removed by statute (11 Geo. IV, c. 40, s. 12, part 1, p. 144), and we are cited to no case in which a court of equity has exercised such jurisdiction where a court of law is now invoked.

On grounds therefore, we think the judgment of the court should be affirmed, with costs.

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The draughtsman of will.—The Roman law held a will in favor of the scrivener. But our courts have not gone to that extent. The scrivener is justly regarded with suspicion, and his testimony is not held to be conclusive against its interests. *Baker v. Batt*, 1 Curteis, 135.

In the latter case it is held that, in such a will, the burden of proof is, in every case, upon the party propounding the will to satisfy the conscience of the court in respect to such provisions, and further that the court will always, or very generally, look with suspicion upon such provisions, and require very clear proof that the paper propounded does express the true will of the deceased. The English decisions seem to go no further than this, and the American cases contain essentially the same law. *DeLafield v. Parish*, 25 N. Y. 9; *Crispell v. Dubois*, 4 Barb. (N. Y.) 398.

It is sometimes said that from the nature of the transaction undue influence is presumed, but even then the presumption is one of fact, and not of law, and may be rebutted by proper evidence. *Harvey v. Gullens*, 46 Mo. 147; *St. Leger's Appeal*, 84 Conn. 434; *Wright v. Howe*, 7 Jones' (N. C.) Equity, 412; *Garvin's Adm. v. Williams*, 44 Mo. 465; *Beall v. Mann*, 5 Ga. 456.

The same rule as to the *onus probandi* is held in Maryland to apply even where the will is written by the executor named in it, and the entire property given to persons not of kin to the testator. *Garner v. Crumbaugh*, 8 Md. 491.

This is obviously only a branch of the more general rule that bequests to any one standing in any confidential or fiduciary relation to the testator, as attorney and client, spiritual adviser or advisee, trustee and *cousin qui trust*, parent and child, guardian and ward, or physician and patient, are watched by courts, called upon to construe wills, with the most scrutinizing jealousy. See an opinion of Chancellor Walworth, in *re Van Horn*, 7 Paige, 46; *Breed v. Pratt*, 18 Pick. (Mass.) 115; *Patterson v. Patterson*, 6 Serg. & R. 55; *Wilson v. Moran*, 8 Bradf. 172; *Garvin's Adm. v. Williams*, cited above; *Tyler v. Gardner*, 35 N. Y. 559; *Meek v. Perry*, 36 Miss. 190.

WHITTAKER vs. WHITTAKER.

[10 B. J. Lea, 93.]

COMPELLING ADMINISTRATOR TO ACCOUNT IN FOREIGN JURISDICTION.—EFFECT OF ACCOUNTING IN FORUM OF APPOINTMENT.

An administrator bringing funds into a foreign jurisdiction, where he improperly appropriates or invests them, may be compelled to account there as trustee for the parties in interest, before the time limited for a settlement of the estate, in the place of his appointment, has expired.

A settlement of his accounts in the forum of appointment, pending the litigation, is conclusive, and limits the recovery against him to the amount found in his hands.

APPEAL from the Chancery Court at Blountville.

Deaderick, York and Fulkerson, for complainants.

Tipton, H. M. Folsom and N. M. Taylor, for defendants.

COOPER, J. On March 9, 1871, W. S. Whittaker died intestate and unmarried in the State of Illinois, where he resided. The complainants and defendants, except Elizabeth the wife of the defendant A. R. Whittaker, are his heirs and distributees. One S. G. Lewis was appointed and qualified as administrator of his estate. On May 28, 1872, the complainants, who are citizens of the State of Virginia, appointed the defendant A. R. Whittaker as their agent to go to the State of Illinois and attend to the interest of the heirs and distributees in the estate. They executed to him on that day a power of attorney to demand, sue for, and receive from the administrator, and all other persons, all moneys due them as heirs and distributees, to adjust and settle the accounts touching the same, and give all necessary receipts and acquittances. It further authorized him to institute such legal proceedings in the courts of Illinois as may be required to secure the faithful administration of the estate, and the removal of the administrator and revocation of his powers if deemed advisable. One Wm. Ferrell was united with A. R. Whittaker in the power of attorney, but he practically did nothing under the power, and in a short time notified the parties that he declined to act further as agent. A. R. Whittaker went to Illinois, with this power of attorney, and took such steps that the administrator Lewis was induced to resign, and on July 15, 1872, he was appointed and qualified as administrator, and received from his predecessor several thousand dollars in money, as well as other assets. A rule was afterwards made upon him to give additional security, and failing to comply, he was removed as administrator on November 18, 1873, and Henry C. Withers was

appointed in his place. Subsequently, the defendant seems to have made a settlement with the Probate Court, in which he was brought in debt to the estate in the sum of \$2,357 26, and was ordered by the court, on January 19, 1874, to pay the same over to his successor in office.

In the meantime, the defendant, A. R. Whittaker, made no report of his acts as agent to his principal, but went to Carter county and invested the money of the estate in the name of his wife in a tract of land in that county. The land was subject to a lien in favor of one Susan Thomas, which was being enforced by legal proceedings in the Chancery Court of Sullivan county, and under which the land had been sold and bought by third persons. With the consent of those persons, the defendant paid the money into the Chancery Court of Sullivan county, and his wife was, by the decree of that court in the case there pending, entered May 23, 1873, subrogated to the rights and liens of Susan Thomas to the extent of such payment.

The present bill was filed November 22, 1873, in the Chancery Court of Sullivan county, to call the defendant, A. R. Whittaker, to account as agent for the money thus received and invested. The interest acquired by the wife in the land was attached, and Whittaker and wife enjoined from making any disposition thereof, or of the money invested. The bill stated on its face that A. R. Whittaker and wife were citizens of Carter county, and that the land lay in that county. The other defendants are some of the heirs and distributees of the intestate, who are alleged to reside "in the west," and whose residences are unknown. The bill proceeds against the defendant, A. R. Whittaker, as the agent of the complainants, and as having received the funds of the estate in that capacity. It does not mention the fact that the defendant had become the administrator of the estate in Illinois.

The defendants, Whittaker and wife, demurred to the bill, and assigned as cause of demurrer: "That the subject-matter of the bill is not within the jurisdiction of the Chancery Court of Sullivan county to determine, but within the jurisdiction of the Chancery Court at Elizabethton for the county of Carter."

Under the Code, sec. 2934, a demurrer must, both at law and in equity, state the specific ground relied on, and no other objection can be noticed. (*Kirkman v. Snodgrass*, 3 Head, 372; *Fitzgerald v Cummings*, 1 Lea, 232.) The subject-matter of the bill is the liability of A. R. Whittaker for the funds of the estate of W. S. Whittaker brought by him into this State, and, as an incident, the fund is sought to be followed into the land in which it has been invested. The theory of the demurrer is, that the land is the "subject-matter" of the litigation, and as that lies in Carter county, the Chancery Court of Sullivan county has no jurisdiction over it. But it is a matter of no consequence where the land lies, if the court has jurisdiction of the persons of the defendants Whittaker and wife. The jurisdiction of the court does not depend upon the attachment. That writ was unnecessary, the interest of defendant Elizabeth in the land attached being impounded by the filing of the bill, and the writ of injunction. Whether the court would have jurisdiction of the persons of the defendants, upon proper defense, we need not inquire. No such objection is made.

Upon the demurrer being overruled, the defendant A. R. Whittaker filed a plea, to the effect that on July 15, 1872, he was appointed and qualified as administrator *de bonis non* of the estate of W. S. Whittaker, deceased, in the proper county of Illinois; that as such administrator he received and receipted for the assets in the hands of Lewis the former administrator, and took possession of other assets; that by the laws of that State two years or more are allowed in which to administer, and that the time had not elapsed, and defendant had not exhibited his accounts or made settlement of his administration with the Probate Court to which he was answerable; that the Court of Chancery in Tennessee had no jurisdiction to investigate his accounts, etc. The plea was set for hearing on its sufficiency, and by the chancellor overruled.

It is well settled in this State, that a foreign administrator or executor cannot be sued as such. But it is equally well settled that if a foreign administrator or executor come within the jurisdiction of our courts, bringing with him funds or property belonging to the trust estate, he may be held to ac-

count here as trustee for those entitled to the effects in his hands. (*Beeler v. Dunn*, 3 Head, 90; *Caldwell v. Maxwell*, 2 Tenn. 102; *Townsend v. Markum*, MS. opinion, Nashville, 1876, cited in *Dillard v. Harris*, 2 Tenn. Ch. 206.) The weight of authority is to the same effect in other States. (*Mo-Namara v. Dwyer*, 7 Paige, 239; *Brownlee v. Lockwood*, 5 C. E. Green, 255; *Tunstall v. Pollard*, 11 Leigh, 1; *Moore v. Hood*, 9 Rich. Eq. 311.) A settlement of the administration in the form of appointment is conclusive upon the rights of the parties. (*George v. Lee*, 6 Hum. 61; *Allsup v. Allsup*, 10 Yer. 283.) If he makes no settlement in the proper forum, the parties interested may follow him, and compel him to account in his own forum. They are not driven to sue the sureties on his official bond, nor to go through the form of an account in the forum of administration. (*Patton v. Overton*, 8 Hum. 192.) Ordinarily, the beneficiaries would not be entitled to proceed against him until the time for the settlement of the administration has expired. But if it clearly appear that he is improperly appropriating or investing the funds of the estate, as in this case, the interested parties may sue at once, and impound the funds, for the act is a clear breach of trust which gives *eo instanti* a right of action. If he afterwards, pending the litigation, settle his accounts in the forum of appointment, the recovery will be limited to the amount found in his hands, and will inure to the exoneration of himself and his sureties on his official bond. The plea was, therefore, insufficient to abate or bar the action, and was properly overruled. Upon overruling a plea for insufficiency, the defendant is of course entitled to answer. (Code, sec. 4395.) And, perhaps, the chancellor ought to have given the defendant, in some mode, the benefit of the matter of the plea in his answer. (*Brien v. Marsh*, 1 Tenn. Ch. 625.) For, although the facts were not sufficient to stay the suit, they might have some bearing upon the details of the relief. His honor was in error in striking out of the answer the facts thus relied on. But we cannot see that the order thus made operated to the prejudice of the defendant. For the proceedings of the Probate Court of Illinois were introduced without objection, and the final

decree of the chancellor fixing the amount of the defendant's liability was based upon the decree of the Probate Court of Illinois ascertaining that liability upon a settlement by the defendant of his administration.

The proof clearly makes out the case as set out in the first part of this opinion. The answer of the defendant virtually admits the material facts. His defense on the merits is that he has retained no more than his share in the estate, which he contends he had a right to do. But, until division by judicial authority, he had no right to consider any specific part of those funds as his share. That would be to give to an administrator, acting in a fiduciary capacity, the right to select his own share. The Probate Court of Illinois held that he was not entitled to the fund, and ordered him to pay it over to the administrator *de bonis non*. The decree of the chancellor is more favorable, for it allows him a credit for his proportional share of the fund.

There is no error in the decree, and it will be affirmed with costs.

See *Leach v. Buckner*, p. 61, *infra*.

WILL OF HEWITT.

[91 New York, 261.]

SIGNATURES OF ATTESTING WITNESSES AT END OF WILL.

Signatures by attesting witnesses at the bottom of the first page and top of the second or last page, over important provisions of the will, are not at the end of the will, as required by statute.

APPEAL from a judgment of the general term of the Supreme Court in the first department, affirming a decree of the surrogate of New York county, refusing to admit to probate the will of Edward Hewitt, deceased.

The opinion states the facts.

Jesse K. Furlong, for appellant.

S. R. Ten Eyck, for respondent.

EARL, J. Edward Hewitt died in May, 1881, leaving an instrument purporting to be his will, which was executed a short time before his death. It was written on two sides of an irregular shaped piece of paper, about one-half of it upon one side and the other half upon the other side. The witnesses signed their names at the bottom of the first side and again at the top of the second side. The deceased signed his name at the end of the disposing portion of the instrument, near the middle of the second side, and again at the bottom of the second side. Thomas Hewitt, a brother of the deceased, presented a petition to the surrogate of New York, praying for probate of the instrument as a will. Upon that petition citations were issued, and on the return day of the citations the widow of the deceased filed objections to the probate of the instrument relating to the manner and form of its execution. The matter was then adjourned to the 22d day of June, 1881, and the counsel for the contestant then made a motion that probate of the instrument be denied, for the reason that the witnesses thereto had not signed their names at the end thereof. The counsel for the proponent claimed the right, then and there, to examine his witnesses and to give proof of certain facts stated by him; but the surrogate declined to hear any evidence on the part of the proponent, and made a decree denying probate of the instrument upon the ground that the attesting witnesses did not sign their names at the end thereof. The decree of the surrogate was affirmed upon appeal to the general term of the Supreme Court, and then the proponent appealed to this court.

We are of opinion that probate of the instrument was properly denied. The statute (3 R. S. [7th ed.], § 2285) prescribes the formalities which shall attend the execution of a will, one of which is that it shall be subscribed by the testator at the

end of the will; and another is that the attesting witnesses shall sign their names at the end of the will. However unimportant these formalities may be in any particular case, they must be substantially observed in order to make a valid will. None of them can be dispensed with. As said by the chief justice in the case of *Remsen v. Brinckerhoff*, 26 Wend. 325, after stating the four requisites prescribed by the statute for the formal execution of wills: "It is obvious that every one of these four requisites, in contemplation of the statute, is to be regarded as essential as another, and there must be a concurrence of all to give validity to the act, and that the omission of either is fatal." It is the requirement of the statute that both the testator and the witnesses must sign at the end of the will. Wherever the will ends there the signatures must be found, and one place cannot be the end for the purpose of subscribing by the testator and another place be the end for the purpose of signing by the witnesses. As was said by Judge Folger in *Sisters of Charity v. Kelly*, 67 N. Y. 409, a case in which probate of a will was denied because the signature of the testator was not at the end of the will: "Can we say that the end of a will has been found until the last word of all the provisions of it has been reached? To say that where the name is there is the end of the will is not to observe the statute. That requires that where the end of the will is there shall be the name. It is to make a new law to say that where we find the name there is the end of the will. The instrument offered is to be scanned, to learn where is the end of it as a completed whole; and at the end thus found must the name of the testator be subscribed." If the name of the testator had been written where the names of the witnesses are found no one could properly claim that it was written at the end of the will. Here the signatures of the witnesses are followed by an important provision of the will, disposing of property to his brother. They are not written at the end of the will, but manifestly near the middle thereof, and hence plainly, from an inspection of the will, the statute was not complied with.

There was no error committed by the surrogate in refusing to hear the proofs offered on the part of the proponent. It

would have been wholly unavailing to show that this will was in other respects properly executed; that there was some excuse for not placing the names of the witnesses at the end of the will; that there was the absence of fraud, and that the transaction was attended with entire good faith and fairness. The proof offered would not tend to show that the place where the signatures were signed was the end of the will. No proof could show that. That was a fact which could not be removed from the case by any evidence, and the requirement that the signatures should be at the end of the will could not be supplied by any evidence; and, hence, it was proper for the surrogate, upon the production of this instrument before him, to refuse to receive evidence and deny probate, just as he would have been authorized to do if the name of the testator, instead of being subscribed at the end of the will, had been simply written at its commencement.

We are, therefore, of opinion that the judgment of the Supreme Court should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

LEACH vs. BUCKNER.

[19 West Virginia, 36.]

EXAMINATION OF ACCOUNTS OF ANCILLARY ADMINISTRATOR AFTER FRAUDULENT SETTLEMENT IN FORUM OF APPOINTMENT.

The courts of a State granting ancillary administration have jurisdiction of an action to surcharge and falsify the accounts of the administrator which were settled upon a false balance derived from a fraudulent *ex parte* settlement of accounts by such administrator in the forum of his original appointment.

APPEAL from a decree of the Circuit Court of the county of Wood.

The bill was filed by plaintiffs as heirs at law of Willis

Leach against Robert Buckner, to surcharge and falsify his accounts as administrator of the deceased's estate. It alleged Buckner's appointment as administrator in Ohio, where the intestate was domiciled at the time of his death and his appointment as ancillary administrator in this State. It charged that Buckner had made a settlement of his accounts in Ohio, in which he falsely and fraudulently omitted an item of \$1,700, a balance of purchase-money on a sale made by him, and falsely credited himself with a fictitious payment of \$500, thereby bringing the estate in debt to him in the sum of \$1,709 93, which false balance he had used in settling his accounts in this State as ancillary administrator.

Buckner interposed a demurrer, which was overruled, and, upon a reference to a master, he was found indebted to the estate in the sum of \$814 79.

A. J. Boreman, for appellant.

John A. Hutchinson, for appellees.

JOHNSON, P. The depositions clearly show, that the administrator received \$1,500 purchase-money from Byrd, with which he failed to charge himself; and that he had given himself credit for \$500, as paid to Mrs. Mary Leach, to which he was not entitled. The main question that demands our consideration in this cause is: Did the Court of Chancery in this State have jurisdiction to surcharge and falsify the account in the manner in which it was done? If it had, we see no error in the decree, so far as it ascertained that the defendant Buckner was indebted to the estate of his intestate in the amount ascertained in the decree. To show that the court had no authority or jurisdiction to review the settlement made in Ohio, counsel for appellant cites *Voorhees v. Bank of United States*, 10 Pet. 449; *Fisher v. Bassett*, 9 Leigh, 110, Judge Tucker's Opinion, 131; *Cox v. Thomas' Adm'x*, 9 Gratt. 323, Judge Allen's Opinion, 325, 326; *Gibson v. Beckham*, 16 Gratt. 321; *Lancaster v. Wilson*, 27 Gratt. 621; *Hall v. Hall*, 12 W. Va. 1.

Voorhees v. Bank of United States, was an action of eject-

ment, which was tried in the circuit court of the United States for the district of Ohio; and upon the trial the validity of an attachment issued by the State court, and under which the land was sold, was questioned. The Supreme Court says: "This was the judgment of a court of competent jurisdiction on all the acts preceding the sale, affirming their validity in the same manner as the judgment had affirmed the existence of a debt. There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been right, until the contrary appears."

In *Fisher v. Bassett*, it was held, that where a county or corporation court grants administration of the estate of a foreigner, who died abroad, and who had no residence in the county or corporation at the time of his death, and had no estate of any kind there, so that in truth the state of facts is not such as to give the court jurisdiction to grant administration in the particular case according to the provisions of the statute, such a grant of administration is not void but only a voidable act, and therefore rightful acts of and fair dealings with the administrator, consummated before his administration is revoked or superseded, cannot be impeached.

In *Cox v. Thomas' Adm'r*, 9 Gratt. 323, it was held, that a judgment of a circuit court, upon a notice and motion in favor of a creditor, against a high sheriff or his administratrix, for the default of his deputy in not paying over money collected on an execution, which issued from a county court, is conclusive of the jurisdiction of the court, unless reversed on appeal; and its validity cannot be called into question by the deputy or his sureties, on a motion by the high sheriff or his administratrix against them, founded on said judgment.

In *Gibson v. Beckham*, 16 Gratt. 321, it was held, that where a court has cognizance of the subject-matter, its judgment, though it may be erroneous, is not void. It is binding until it is set aside or reversed, and cannot be questioned incidentally, acts done and bonds taken under it binding the obligors.

In *Lancaster v. Wilson*, it was held, that a judgment of a court of record could not be impeached in another action, ex-

cept for want of jurisdiction in the court, or fraud in the parties or actors in it.

In *Hall v. Hall*, it was held, that where a judgment or decree of a court of general civil jurisdiction is offered in evidence collaterally in another suit, its validity cannot be questioned for errors which do not affect the jurisdiction of the court. The counsel also relies on the following authorities: *Vaughn v. Northop*, 15 Pet. 1; *McLean v. Meek*, 18 How. 16; *Wilkins v. Ellett*, 9 Wall. 740; *Andrews v. Avory*, 14 Gratt. (Judge Moncure's opinion), 239-249; Whart. Con. L. 666 *et seq.*; 2 Kent's Comm. 421-429; Story's Eq. Pl. 179.

In *Vaughn v. Northop*, it was held, that every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not *de jure* extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other State; and whatever operation is allowed to it, beyond the original territory of the grant, is a mere matter of courtesy, which every nation is at liberty to yield or to withhold according to its own policy and pleasure with reference to its own institutions and the interests of its own citizens.

In *McLean v. Meek*, 18 How. 16, it was held, that the record of a debt against an administrator in our State, is not sufficient evidence of the debt against the same administrator, of the same estate, in another State.

In *Wilkins v. Ellett*, 9 Wall. 740, it was held, that a voluntary payment of a debt to a foreign administrator was good as against the claim of an administrator duly appointed at the domicile of the debtor, in which last place the debt was paid; there having been no creditors of the intestate in this last place, nor any persons there entitled as distributees.

In *Andrews v. Avory*, 14 Gratt. 229, it was held, that where an administrator appointed in Virginia, whose intestate lived and died in North Carolina, and left no estate in Virginia, went to North Carolina and, without qualifying, there took possession of the assets and brought them back to Vir-

ginia, his sureties in Virginia were liable for his faithful administration of these assets.

It is not necessary to refer to the other authorities cited.

While not disputing the correctness of the principles laid down in the foregoing decisions, the counsel for appellees insists that they do not cover the case made by the bill, and have no application to a case like the one at bar, and he cites a number of pertinent cases, which we will proceed to review.

If there is no relief in a case like the one before us, without going to the State of Ohio, to purge a settlement of a confessed, as he thinks, fraud upon the distributees of his intestate's estate, it would be inconvenient, to say the least. The principle is well settled, that the *ex parte* settlement of a fiduciary is only *prima facie* correct, and parties interested may file a bill to surcharge and falsify the account so settled. (*Anderson v. Fox*, 2 H. & M. 261; *Preston v. Gressom*, 4 Munf. 110; *Newton v. Poole*, 12 Leigh, 112; *Peale v. Hickie*, 9 Gratt. 437; *Corbin v. Mills*, 19 Gratt. 438; *Shugart v. Thompson*, 10 Leigh, 434; *McGuire v. Wright*, 18 W. Va. 507.) Upon this question there is no doubt, and it will be borne in mind that the partial and final settlements made by the defendant Buckner before the Probate Court of Vinton county, Ohio, like settlements made under our statute before a commissioner, are *ex parte* settlements, and nothing more.

In *Dickerson v. Hoomes' Adm'r*, 8 Gratt. 410, Moncure, J., in delivering the opinion of the court, said: "The question is, whether the land descended to them in Kentucky is assets, and whether they ought to be bound for the value of said land descended to them, at least to the extent to which it actually came to their hands. I think this question should be answered in the affirmative. It is undoubtedly true, that real estate or immovable property is exclusively subject to the laws of the government within whose territory it is situate, and that no writ of sequestration or execution, or any order, judgment or decree of a foreign court, can be enforced against it. But I think it no less true, that equity, as it acts primarily *in personam*, and not merely *in rem*, may, where a person against

whom relief is sought is within the jurisdiction, make a decree upon the ground of a contract or any equity subsisting between the parties respecting property situated out of the jurisdiction."

In *Powell v. Stratton*, 11 Gratt., it was held, under the circumstances, that a person who had qualified as administrator of an estate in Mississippi, should be held in Virginia to account for his administration.

Marshall, C. J., in *Massie v. Watts*, 6 Cranch, 158, said: "This suit having been originally instituted in the court of Kentucky, for the purpose of obtaining a conveyance for lands lying in the State of Ohio, an objection is made by the plaintiff in error, who was the defendant below, to the jurisdiction of the court, by which the decree was rendered. Taking into view the character of the suit in chancery brought to establish a prior title originating under the land law of Virginia against a person claiming under a senior patent, considering it as a substitute for a *caveat* introduced by the peculiar circumstances attending these titles, this court is of opinion, that there is much reason for considering it as a local action, and for confining it to the court sitting within the State in which the lands lie. Was this cause, therefore, to be considered as involving a naked question of title? Were it, for example, a contract between Watts and Powell, the jurisdiction of the circuit court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction, wherever the person may be found, and the circumstances, that a question of title may be involved in the inquiry, and may even constitute the essential point, on which the case depends, does not seem sufficient to arrest that jurisdiction."

In *Tunstall v. Pollard's Adm'r*, 11 Leigh, 1, it was held, that an executor having taken probate of a testator's will and letters testamentary in England, and collected the assets of testator's estate there and brought them with him into Virginia,

but having never qualified as executor in Virginia, is liable to be sued by the legatees in the Court of Chancery in Virginia for an account of his administration and for the legacies that remain unpaid. After an elaborate review of the authorities, Tucker, President, says: "Upon a full review of the whole subject I am of opinion, that justice, convenience and necessity require a recognition of the right to sue an executor who has qualified abroad, if he comes within the jurisdiction bringing the assets with him; and no authority sustains the contrary proposition."

In *McNamara v. Dwyer*, 7 Payne, 239, it was held, that the Court of Chancery has jurisdiction to compel a foreign executor or administrator to account for the trust funds, which he received abroad and brought with him into this State; and that, too, without taking out letters of administration on the estate of the decedent here. See also *Campbell, Adm'r v. Toussy, Ex'r*, 7 Cow. 64; *Brown v. Brown*, 4 Ed. Ch. 343; *Gulick, Adm'r v. Gulick*, 33 Barb. 92.

The element of fraud comes into the case at bar and relieves it of much of the difficulty that might otherwise surround it. A judgment or decree, either foreign or domestic, fraudulently obtained, may be set aside, and much more easily a fraudulent *ex parte* settlement of a fiduciary. (2 J. J. Marsh. 405; *Lazier v. Westcott*, 26 N. Y. 146; *Lancaster v. Wilson*, 27 Gratt. 624; *Boulton v. Scott's Adm'r*, 2 Green [N. J.], 231.) In such a case it is not necessary for such purpose to go to the State, where the party fraudulently obtained the decree, but such suit may be properly brought where the party resides. It is expressly charged in the bill, that the defendant, Robert Buckner, falsely and fraudulently represented to the Probate Court of Vinton county, Ohio, that he had accounted for the balance of the purchase-money due from R. A. Byrd, in a settlement which he had made in West Virginia, and that he imposed upon said court a false receipt for the \$500, for which he there received credit for that sum as having been paid to the widow, Mary Leach. These charges in the bill he does not controvert, and for the purposes of this suit they must be taken as true, although he was specially called upon in the bill for a discov-

ery, and after ample opportunity had, he fails to answer the bill, and put the plaintiffs on proof of the charges of fraud explicitly made against him. It thus appears, that he went to Ohio and fraudulently imposed a false settlement upon the Probate Court of Vinton county, Ohio, and by said false and fraudulent settlement brought the estate there in debt to him over \$1,700, and then with his ill-gotten gains came back to West Virginia, where not only himself but a number of the plaintiffs live, and where he had been appointed and qualified as administrator of the estate of his intestate, and went before a commissioner and charged this false balance, so falsely and fraudulently obtained in Ohio against the estate, and then coolly folds his arms, refuses to answer the charges made against him, and says: "You can't inquire here into my settlement made in Ohio."

Fraud vitiates everything it touches; and a party guilty of fraud cannot claim protection here because his fraud was committed in another State. The court had jurisdiction and had a right to surcharge and falsify the account settled before commissioner Shaw, and in doing so show that the balance of over \$1,700 falsely and fraudulently obtained before the Probate Court of Ohio was false, and to show what he should have charged himself with there, and what he should have credited himself with there as charged in the bill, in order to see what should have been the balance there, and what should be the state of the account here. This was done and properly done in this suit, and the amount of the administrator's indebtedness to the estate, when the account was corrected according to the bill and proofs, was ascertained. The defendant Buckner being an ancillary as well as domiciliary administrator, there can be no doubt about the correctness of the position we have assumed.

Was it error to decree that the whole of the indebtedness of the defendant should be paid to the plaintiff? It is insisted by counsel for appellees, that if it was an error it will not justify a reversal of the decree, but the decree in that case should be corrected and affirmed; and he cites the following authorities: *Henly v. Menefee*, 10 W. Va. 782; *Richards v. Fisher*,

8 W. Va. 55; *Handley v. Snodgrass*, 9 Leigh, 484; *Mott v. Carter*, 26 Gratt. 127; *Graham v. Pierce*, 19 Gratt. 29. But none of these authorities apply to a case like this. It does not appear in the record, whether the heirs ought each to receive an equal share of this amount or not, nor what amount Buckner or his wife ought to receive therefrom. By an exhibit filed with the bill, it appears that a number of the plaintiffs owe debts, evidenced by notes, to the estate, which may have been and probably were settled in another manner, but it is impossible to tell from the record as it now is, what is the fact as to said settlement. We cannot correct the decree and affirm it under the circumstances of this case.

So far as said decree ordered the whole of said sum of money to be paid to the plaintiff, it is erroneous and must be reversed with costs to the appellant, to be paid by the appellees other than Louisa Buckner and the unknown heirs of John Leach; and in all other respects said decree is affirmed and this cause is remanded to the circuit court of Wood county, with instructions to cause proper distribution to be made of said sum of money to those entitled thereto, and in the proportion to which they may be thereto entitled.

Judges HAYMOND and GREEN concurred.

Decree reversed in part. Cause remanded.

FLOOD vs. PRAGOFF.

[79 Kentucky, 607.]

KNOWLEDGE BY SUBSCRIBING WITNESSES THAT PAPER ATTESTED
IS A WILL.—SIGNING AT “END OR CLOSE” OF WILL.

It is not necessary that subscribing witnesses should know the paper signed by them to be a will.

A statute requiring that the testator's signature to his will be placed at the “end or close thereof,” is complied with, although it precedes the date.

E. E. McKay, Lane & Harrison and W. Lindsay, for appellants.

Goodloe, Roberts & Humphrey and Barret & Brown, for appellees.

HINES, J. Richard J. Usher, in 1873, executed a will, dividing his property between the parties to this action, none of whom are related to him, and in 1877, he executed a codicil revoking all devises to appellants, and died within about two years thereafter. The will was admitted to probate without objection, but the probate of the codicil was opposed by appellants on the ground of incapacity and undue influence, and from a verdict and judgment against them they appeal.

The codicil reads as follows :

"I, Richard J. Usher, of Louisville, Ky., do make this my codicil, confirming my last will, and do hereby revoke all clauses in said will or previous codicil bequeathing or leaving anything to Michael Flood, or any of his children or connection.

RICHARD J. USHER.

"GEORGE HOWARD,

"HENRY DEPPEN, JR.,

"LOUISVILLE, Ky., April 3d, 1877."

The testimony of the subscribing witnesses, Howard and Deppen, is to the effect that they were called upon, in the office of Pragoff, one of the devisees, to witness the signature of Richard J. Usher to the paper offered as a codicil, and that each of them, at the request of Usher, signed the paper in his presence, and in the presence of Pragoff, Usher having signed his name in their presence previous thereto, and that neither of the deponents saw any writing above the signature of Usher, and that they did not know what preceded the signature, whether it was a will or not, because they say that whatever writing, if any, there may have been, was concealed by the paper being folded down over it, or by reason of its being concealed by a blotter. The subscribing witnesses further state that Usher was of sound mind at the time they subscribed the will. The testimony of Pragoff is that he wrote the codicil at

the request of Usher, and that the paper presented is the one signed in his presence by Usher and the attesting witnesses, and was by the witness, after execution, handed to the testator.

Upon the record the following inquiries arise, the consideration of which will sufficiently indicate the objections of counsel for appellants to the ruling of the court below :

First. Is it necessary for a testator to acquaint the witnesses to his will or codicil with the fact that it is a will or codicil ?

Second. What is a sufficient signing of a will ?

Third. Who are competent to testify on an application to probate a will ?

Fourth. Are the instructions given a correct exposition of the law ?

In reference to the first and second inquiries, it is proper to consider the following provisions of the General Statutes :

“No will shall be valid unless it is in writing, with the name of the testator *subscribed thereto by himself, or by some other person in his presence, and by his direction* ; and moreover, if not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator.” (Sec. 5, chap. 113.)

“When the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature be subscribed at the end or close of such writing.” (Sec. 26, chap. 21.)

As to the attestation, the statute appears to have been literally complied with, but it is contended for appellants that a literal compliance is not enough ; that there arises, by necessary implication from the language used, a further requisite to a valid execution, and that is that the subscribing witnesses must know that they are subscribing the will of the person whose signature they attest, or they must be informed by him that it is his will which they subscribe. This, we think, is not required. The legislature has prescribed such formalities as it

deemed proper, and we ought not to add to these formalities by construction, especially when the efficacy of the constructive requirement depends solely upon the memory of the subscribing witness. After any considerable lapse of time, the witness who could remember the circumstances connected with his subscription to the paper, so as to be able to state that the person, whose signature he was called to attest, declared that the paper signed was a will, might justly be subjected to the suspicion of fabrication, one of the principal things against which the formalities specifically prescribed were designed to guard. It would be as reasonable to suppose that the legislature intended to require that the subscribing witness should know that the paper was a will by reading it or by having it read to him, something that this court has repeatedly held not essential. (*Higdon's Will*, 6 J. J. M. 445.)

These rulings show the understanding of the court to be that the attestation is of the genuineness of the signature of the testator, and not of the contents of the paper. If, then, the witness is not required to know the contents of the paper, which could only be known to him by such inspection, what beneficial end is attained by requiring him to state that the testator declared the writing to be his will, or that the signature attested is to his will? But it is insisted that the paper may have been blank, and the writing above the signature thereafter made, in which case there would not be a compliance with the requirements of the statute. Such might be the case as well when the declaration is made that the paper contains a will as when there was no such declaration; for it is not to be supposed that the paper was blank, for in that case the signing would be meaningless, unless the person whose signature is attested contemplates a fraud, which could as well be accomplished by a declaration that there was writing on the paper above the signature, and that the writing was a will. The person making the paper, being of sound mind, it is not to be presumed that he is doing a vain or foolish thing in requiring the attestation, or that he contemplates a fraud, so that when the paper is presented for probate, and it appears upon its face to be a will or codicil in regular form, without any

marks of alteration or other suspicious indications, the presumption is that the writing was on the paper when signed, and that the testator knew its contents. In such case the burden is on the contestants to show fraud, incapacity, or undue influence. In, fact, it is not ordinarily necessary that the propounders should show, as they did by the attesting witnesses, that the testator was of sound mind, provided the statutory requirements were complied with, and there is nothing in the paper when presented which is irrational or inconsistent. Then the burden shifts to the contestants. (*Milton v. Hunter*, 13 Bush, 163.)

It is insisted, however, that the presumption of capacity and volition in the execution of the paper is destroyed by the fact that it appears to have been written by one who derives a benefit from its provisions. Conceding this to be the correct rule, its only effect was to require the propounders to volition and capacity, which was sufficiently done. (Bigelow on Fraud, p. 127.)

As to whether the subscribing witness must know that the paper signed by him is a will, or whether it must be so declared to be by the testator, has never arisen in this State; but in other States and under similar statutes it has been held that neither is necessary, and that it is not required that the witnesses should see any writing on the paper.

In the case of *Osborne v. Cook*, 11 Cushing, 532, when the testator did not declare the paper to be a will, and neither of the attesting witnesses knew or suspected the nature of the instrument, the attestation was held sufficient. (*Ela, etc. v. Edwards*, 16 Gray, 92.) It is true that in these cases the wills admitted to probate were holographic; but this fact was referred to in the opinions for the purpose only of showing that the testator knew that he was making a will, a fact that is satisfactorily shown in this case by other evidence.

In the case of *Brown v. McAlister*, 34 Indiana, 375, the will was written by another than the testatrix, and while the paper was so folded as to conceal the writing, the witnesses, at the request of the testatrix, subscribed their names without knowing the character of the writing, and there was no de-

claration by the testatrix or any one else as to whether there was any writing on the paper other than the signature of the testatrix, and no statement as to the object in requesting the witnesses to attest the signature. It was held that the statutory requirements had been complied with.

Such also are the rulings of the English courts upon a statute essentially the same as the statute of this State, it having been held in one case at least that the attestation was good where the witness had been deceived, and led by the testator to believe that the writing subscribed was a deed, and in another where the writing was concealed. (Bacon's Abridgment, vol. 10, pages 494 and 502, title Wills and Testaments; 7 Bingham, 457, *Wright v. Wright*.)

In our opinion it is not necessary, under the facts of this case, that the subscribing witnesses should have been told that the paper signed was a will, or that they should know the character of the paper, or in fact that there was any writing, other than the signatures, on the paper at the time they subscribed it.

As to the second question suggested, it is insisted by appellants' counsel that as the words and figures "Louisville, Ky., April 3d, 1877," follow the signatures of the testator and of the witnesses, the paper was not signed at the "end or close thereof," as required by the statute.

This position is untenable. Neither the date nor the name of the place of making the will is, in this case, a part of the will. The date to a will or codicil is immaterial in all cases. It may be established by oral evidence in contradiction to the written date embodied in the writing. While it is conceded by counsel that ordinarily the date is immaterial, it is insisted that the circumstance that the testator had made several wills during his lifetime constituted this an exception to the rule, as it is important that the codicil appear to have been written subsequent to the will probated in order to affect it. This does not appear to us to be an exception to the rule that the date is not an essential part of the will; but the fact that several wills were made rendered it proper that it should be established in some way that the codicil was executed subse-

quent to the will admitted to probate, which was done by one of the witnesses, who states that he subscribed the codicil some time in the year 1877, while the will admitted to probate was executed in 1873. The circumstances of each case must determine the importance of the date of execution of a will or codicil, and when it becomes the duty of the propounders to fix the date of execution, it may be done in the same way that the time of any other transaction is established—by the writing itself, or by extraneous proof.

On the third point suggested, it is insisted that the court erred in permitting Pragoff, one of the devisees, to state that after the execution of the codicil he handed it to the testator, and that as some of the contestants were infants under fourteen years of age, and the statement of the witnesses was “concerning an act done by, and a transaction with, the decedent,” it was in violation of the provisions of section 606 of the Civil Code.

Section 605 of the Code provides that every person, subject to the modifications contained in section 606, shall be competent to testify for himself or another. Subsection 2 of section 606 reads:

“No person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, an infant under fourteen years of age, or one who is of unsound mind or dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted.”

We think the evidence offered was competent, the object of the statute evidently being to remove the common law ground of incompetency on account of interest, and the exceptions contained in the statute being introduced to secure equality, as said by this court in *Hardin's Adm'r v. Taylor*, 78 Ky. 596. Any other construction would operate in a contest on the probate of a will to exclude the evidence of one interested as to any statement made by the testator in the

absence of one having or claiming a conflicting interest, or when the person having or claiming such interest is under fourteen years of age. Such a result was clearly not contemplated, and the manifest object being to remove all objection to competency on the ground of interest and to secure equality, any exception insisted upon under the statute ought to be made to clearly appear, and ought not to be established by a doubtful or strained construction. Similar statutes in other States have been so construed, and, as said in Wharton on Evidence, section 464, they are remedial, and their operation will not be limited by a technical closeness of construction. The exception is properly applied when the person offering to testify is seeking to establish against the decedent a liability to himself, and through the claim thus established to reach the estate. In such cases there is no equality. There is no mutuality, and there ought not, therefore, to be any admissibility; one litigant being silenced by death, the other ought to be silenced by law. (Wharton on Evidence, sec. 466.) But in cases like the one under consideration there is no such inequality. The several claimants of the estate are on an equal footing, and there is perfect mutuality and equality so far as opportunity and the right to testify is concerned; and that such opportunity and right is sought by the statute is manifest from other provisions. For instance, by subdivision *c* of subsection 2, it is provided that the witness may testify for himself when the decedent, his representative, or some one interested in the estate, shall have testified against the witness in reference to any statement by, or transaction with, the decedent; and subsection 3 provides that no one shall testify against one who is before the court by constructive process only.

As to the fourth point, it is objected that the court below erred in giving instruction "C," because it is in conflict with instruction number three, which was given at the instance of appellants, and which they claim embodies the law.

Instruction "C" is as follows:

"If the jury believe from the evidence that R. J. Usher

signed the paper 'B' (the codicil), this is *prima facie* evidence that he knew its contents before such signing."

Instruction number three referred to is as follows:

"That from the signing of a last will and testament by a testator, the presumption ordinarily is that he knew its contents; but in the case at bar, if the jury believe from the evidence that the paper marked 'B,' except signatures thereto attached, was written by Wm. Francis Pragoff, and that he and his children were devisees and took benefits under said paper, then this presumption is repelled, and unless they find from additional evidence that said paper 'B' expressed the intentions of said Usher, or that he knew its contents, they should find said paper not to be any part of the will of said Richard J. Usher, deceased."

Without stopping to inquire whether these instructions, or either of them, even abstractly, present the law correctly, it is enough to say that neither should have been given; but as they neutralize each other, and do not appear to have been prejudicial to appellants, we will not reverse for this error. These instructions ought not to have been given, because they give undue prominence to certain portions of the evidence, when the whole of it should have been left to be considered and weighed by the jury, without an intimation from the court as to the weight they should give any particular portion of it. Contested will cases are to be tried as any other case in which there is an issue of fact for the jury. The court must pass upon the admissibility of the evidence offered, but when it goes to the jury, they are the sole judges as to the weight they will give it. (*Stokes' Ex'r v. Shippen, &c.*, 13 Bush, 183.)

Judgment affirmed.

Necessity of knowledge by witnesses of contents of will. The rule of law in England, prior to the statute, 1 Vict. c. 26, was clearly established that a witness to a will need not know the character of the paper he attested, the theory being that the attestation was to the *signature*, not to the *document* proposed as a will. In *Wyndham v. Chetwynd*, 1 Burr. 421, Lord Mansfield said, "Suppose the witnesses honest, how little need they know! They do not know the contents; they need not be together; they

need not see the testator sign; if he acknowledges his hand it is sufficient; *they need not know that it is a will.*" To the same effect see *Bond v. Seawall*, 3 Burr. 1775; *Wright v. Wright*, 7 Bing. 457; *White v. British Museum*, 6 Bing. 310; s. c. 3 M. & P. 689.

Trimmer v. Jackson, 4 Burns' Eccl. Law, 8d ed. 102, a case in King's Bench, where, although the witnesses were made to believe the instrument executed to be a deed, their attestation was held good. [An old case in Massachusetts holds a contrary doctrine on this point. *Swett v. Boardman*, 1 Mass. 258.]

The same rule holds in England since the statute of 1 Vict. c. 26. The witnesses need not know that what they attest is a will; one may even believe it to be a deed or other instrument in writing. *Keigwin v. Keigwin*, 3 Curt. 607; s. c. 7 Jur. 840; *Faulds v. Jackson*, 6 Notes Cas. Sup. 1; *Willis v. Lowe*, 5 Notes Cas. 432.

But although the rule is settled in England, there is a diversity of opinion in the United States.

In Massachusetts, in a case where the testator did not declare the paper to be his will, and the witnesses did not even suspect it, their attestation was held sufficient. This is the settled law of that State, following the English rule. *Osborne v. Cook*, 11 Cush. 532; *Hogan v. Grosvenor*, 10 Metc. 54; *Tilden v. Tilden*, 13 Gray, 110.

The same rule is held in Maine. *Cilley v. Cilley*, 34 Maine, 162.

So in Connecticut. *Canada's Appeal*, 47 Conn. 450; 1 Am. Prob. Rep. 1.

And in Virginia. *Beane v. Yerby*, 12 Grattan, 239; *Young v. Barnet*, 27 Id. 96.

In Maryland. *Higgins v. Carlton*, 28 Md. 115; *Etchison v. Etchison*, 53 Id. 348.

In Pennsylvania. *Loy v. Kennedy*, 1 Watts & S. 396; *Miller v. McNeill*, 35 Penn. St. 217. [It is to be noted that the rule in Pennsylvania is somewhat peculiar. *Purd. Dig.* 1474, § 6. Under this act it has been held that a will need not be subscribed by witnesses at all.]

The same rule is held in South Carolina. *Verdier v. Verdier*, 8 Rich. L. 135.

And in Georgia. *Webb v. Fleming*, 30 Ga. 308.

Also in Minnesota and Indiana. *Re Allen's Will*, 25 Minn. 39; s. c. 1 Am. Prob. R. 580; *Brown v. McAllister*, 34 Indiana, 375.

And in Iowa. *Re Hulse's Will*, 52 Iowa, 662; s. c. 1 Am. Prob. R. 352.

Opposed to this long line of authorities are found statutes in several of the States expressly requiring that the testator acknowledge the will to the witnesses, and decisions of many courts of the highest character to the same effect. The statute should be consulted in each case. In States where this view is taken, it is generally held that there must be some de-

claration on the part of the testator to the witnesses to the effect that the paper is his will, but, inasmuch as usually no attestation clause is now required, no form is essential. Any apt words, or even nods or signs, or silent assent, are held sufficient, it being only essential that the witnesses know that the proposed paper is a will. Schouler calls this "the more commendable doctrine." This is the rule in New York. *Remsen v. Brinkerhoff*, 26 Wend. 325; *Coffin v. Coffin*, 23 N. Y. 9; *Rugg v. Rugg*, 83 N. Y. 592; *Walsh v. Walsh*, 4 Redf. 165; *Re Collins*, 5 Id. 20.

And in Vermont. *Adams v. Field*, 21 Vt. 256; *Roberts v. Welch*, 46 Id. 164.

And in Louisiana, following the rule of the civil law. *Succession of Morales*, 16 La. Ann. 267; *Buntin v. Johnson*, 28 La. Ann. 796.

So in New Jersey, by statute. *Compton v. Milton*, 7 Halst. 70; *Mickle v. Matlock*, 2 Harr. (N. J.) 87.

And in Arkansas. *Rogers v. Diamond*, 18 Ark. 474.

In Illinois. *Allison v. Allison*, 46 Ill. 61.

In Ohio. *Raudebaugh v. Shelley*, 6 Ohio St. 307.

Also in California, Michigan and Missouri, and probably in other States. This seems to be the safer rule, and the one most likely to prevail; the text writers all sanction it. *Fusilier's Estate*, *Myrick's Prob.* 40; *Taney's Estate*, Id. 210; *Abbott v. Abbott*, 41 Mich. 540; s. c. 1 Am. Prob. R. 326; *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Hoffman v. Hoffman*, 26 Ala. 535; *Rash v. Purnell*, 2 Harring. 458. See also *Watson v. Pipes*, 32 Miss. 451; *Dean v. Dean*, 27 Vermont, 746; *Heyer v. Burger*, *Hoffm. Ch.* (N.Y.) 1; *Cravens v. Faulconer*, 28 Mo. 19.

WILL OF PEPOON.

[91 New York, 255.]

EFFECT OF ATTESTATION CLAUSE.—FAILURE OF RECOLLECTION OF SUBSCRIBING WITNESSES.

A mere failure of recollection by the subscribing witnesses cannot defeat the probate of a will if the attestation clause and surrounding circumstances satisfactorily establish its execution.

APPEAL from a judgment of the general term of the Supreme Court in the first department, affirming a decree of the

surrogate of the county of New York, admitting to probate the will of Charlotte A. Pepoon, deceased. The opinion states the facts.

John E. Parsons, for appellant.

Wheeler H. Peckham, for respondents.

MILLER, J. The will of the testatrix contained the usual attesting clause, in due form, and was subscribed by the signatures of two attesting witnesses. It comprehended all that was required by law, and upon its face the will bore every appearance of having been lawfully executed. It was dated the 20th of July, 1866, and was executed not long after that. The testatrix died in November, 1880. Considerable time had, therefore, elapsed between the making of the will and the death of the testatrix. There is no doubt as to the testatrix's capacity, and the question is, whether the proofs before the surrogate established that the will had been executed in accordance with the provisions of the Revised Statutes.

The two witnesses to the will, who were sworn before the surrogate, did not, by their evidence, fully establish that the statutory requirements were complied with, yet, with the attestation clause, which fully complied with the statute, it was sufficient to establish the will. The time which had elapsed since the execution of the will was so long, it is by no means remarkable that the recollection of the witnesses should have become somewhat faint and obscure, by reason thereof, and hence it is not always essential, where the attestation clause is full and complete, that every particular should be proved.

The first of the subscribing witnesses, Mr. Roberts, was an employee in the Second National Bank, the place at which the testatrix executed the will in question. He testified he had no clear recollection of the circumstances; that he had a vague impression of her being in the bank, one day, and of her signing and his witnessing the will. He did not remember what occurred at the time, and could only infer that he read the attestation clause; that he thought he knew, at the time, what

was necessary to the proper execution of a will. He also stated, in answer to a question put, that he must have understood the purport of the attestation clause, and was sure of that from his habit of not signing any document, without first reading it. He testified that if the matters stated in the attestation clause had not occurred, he would not have signed it. Upon cross-examination he testified he had no recollection of reading the attestation clause. Upon redirect-examination, after examining the attestation clause, he swore, that he should say, Mrs. Pepoon signed, published and declared the will as and for her last will and testament, in the presence of himself and Mr. Bronson, and that they subscribed their names to it as witnesses, at her request and in her presence, and that he has no doubt it was in the presence of each other. He subsequently stated that he meant by the above only to give the deduction from what he had signed, but had no recollection that he ever knew what she said there, and that he could not say that he recollected any of these circumstances. Although somewhat indefinite, there was some evidence by the witness to establish the fact that the forms of law had been complied with.

The other witness, Mr. Bronson, testified to the will being signed by the testatrix, and then by Mr. Roberts and himself. Reading the attestation clause he says, "she must have declared it to be her will and her signature," but he does not recollect that she said anything more. He further testified to having no recollection of being requested to sign as a witness, but says "he must have read that clause when he signed it, or heard it read, because he never signed anything without knowing what he signed;" he further says, he must have signed at the request of Mrs. Pepoon. He also swears that he would not have signed it without reading that part over his signature, and further, that he would not have signed it unless these things had been so, after he had read it. He testified to the signatures of the testatrix, Mr. Roberts and himself, and said they were all signed in the presence of each other. On cross-examination he makes his testimony still stronger, and says: "I am sure that before signing my name as a witness, I read the attestation clause; I should say that I state that from recollec-

tion ; I know that to be my signature, and I must have read it before I signed it ; I do not think that is all inference ; I mean to state now that I now recollect that I did read that, or that there was read to me that clause."

Every presumption is in favor of the due execution of the will in question. The rule is well established that, where there is a failure of recollection by the subscribing witnesses, the probate of the will cannot be defeated if the attesting clause and the surrounding circumstances satisfactorily establish its execution. (*Rugg v. Rugg*, 83 N. Y. 592 ; *Matter of Kellum*, 52 Id. 517.) Within this rule it is difficult to see why the will in question was not sufficiently proved. Although the witnesses may not have established a case strictly within the requirements of law, yet their testimony strongly tended to sustain the validity of the execution of the will, and the attestation clause being perfect it is not apparent how it can properly be claimed that the will was not sufficiently proved. If the witnesses had been dead it could have been proved according to the provisions of the statutes of this State. The proof given established a stronger case than could have been made out if the witnesses were not living. Under such circumstances it would be going very far to hold that the will was not lawfully proved, and no reported case would uphold such a decision. We agree with the learned counsel for the appellant that probate of a will should be refused when the circumstances establish that there was not the required declaration, yet we think the circumstances here are in the contrary direction and tend to show that there was such a declaration as the law requires, and within none of the cases which have been cited, all of which we have carefully examined, do we find the declaration of the testatrix here was not sufficiently and properly established. It cannot, we think, be fairly contended in this case from the evidence, that there is such an entire absence of recollection by the witnesses that there was the required declaration, for there is at least some evidence tending in that direction. But even if such was the case, we think that within the rule which we have stated, the probate of the will should not be defeated, as the surrounding circumstances all tend to show

its valid execution ; the will was signed by the testatrix and by the subscribing witnesses, and was evidently intended as a legal and valid declaration of the intention of the testatrix. It was prepared with a proper attestation clause and executed for the purpose of disposing of her estate, and hence, is brought within the principle decided in *Rugg v. Rugg (supra)*. Nor can it be contended, we think, that the facts and circumstances establish that the testatrix did not declare the instrument to be her will, and it is to be assumed, from the proof in the case, that the will was executed by the testatrix, that it was attested by witnesses, that it contained an attesting clause containing all the essentials to make it a valid will, and from the other evidence tending to show that it was declared to be such, that no such declaration was made. The evidence presented establishes to the contrary. We think there is nothing in the testimony from which it may be fairly inferred that the witnesses were not aware, at the time of the execution of the will, that they were signing it as such witnesses.

We do not deem it necessary to discuss the testimony at length in regard to the question whether the declaration was made, as it sufficiently appears from the evidence, in connection with the attestation clause, that such was the fact.

Several questions are raised in regard to the admissibility of evidence, which are sufficiently considered in the opinions of the surrogate and of the general term, and do not require a discussion. We think there was no error in this respect.

The judgment should be affirmed.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

ETTER vs. GREENAWALT.

[98 Penn. St. 422.]

PERSONAL LIABILITY OF DEVISEE ACCEPTING DEVISE.—STATUTE OF LIMITATIONS.

If a devisee accepts a gift "for which" he is directed to pay a sum of money to a third person, he assumes a personal liability to make such payment. The statute of limitations runs against such a debt from the date of the testator's death.

ACTION of debt by Susannah Etter, and Nicholas Snyder and Eliza his wife.

Godfrey Greenawalt, the father of Mrs. Etter, Mrs. Snyder and the defendant, left a will containing a clause commencing, "I do also devise to my said son Henry, my undivided half-part of the piece of land in the same township (Hamilton), known as the Palmer tract, containing, in all, about forty-one acres," and ending as quoted in the opinion.

The defendant accepted the devise. Judgment was given in his favor in the court below.

J. McD. Sharpe and Stenger & McKnight, for plaintiffs in error.

Kennedy & Stewart, for defendant in error.

GREEN, J. This was an action of debt brought against the defendant by his two sisters, one of whom was a widow and the other a married woman. The right of action upon which the suit was founded was an alleged liability of the defendant to pay to his sisters, the plaintiffs, a sum of money which he was directed by his father's will to pay to them in consideration of a tract of land devised by the will to him. The language of the will as to the payment of the money, is, "*for which devise*, I will and direct that Henry shall pay in equal proportions to my two married daughters, Susannah Etter and Eliza Snyder (for their own separate and exclusive use), at the

rate of twenty dollars per acre, the same to be paid in four equal annual installments, the first of which is to become due and payable at the expiration of five years after my decease." The testator died in December, 1847, and the action was not brought until 1880. The only question brought here is, as to the effect of the plea of the statute of limitations, which was sustained by the court below, as to both the plaintiffs. Mrs. Etter became *discover*t in February, 1871, by the death of her husband. Mrs. Snyder is still *covert* and her husband has joined in the suit. The case was argued and decided in the court below, upon the concession, that this is not the case of a legacy charged on land, and that an action of debt was therefore the proper remedy. As the payment of the money to the sisters was apparently, under the peculiar phraseology of the will, in part at least, the *consideration* of the devise to the defendant, we are not prepared to assent to the correctness of the concession. But that question is not before us, and therefore we forbear either its decision or its discussion. On the general question or the application of the statute of limitations to the liability of the defendant, we concur with the learned court below in holding that the obligation of the defendant is subject to the operation of the act. By accepting the devise he agreed to pay the sum given to his sisters, according to the terms of the will. That agreement is an implied contract without specialty, and is therefore within the letter of the act of 1713. All the cases hold that when the devisee accepts the land in such circumstances, he thereby agrees to pay the money which he is by the will directed to pay. He becomes subject to a personal liability to pay, and that, too, whether the money is charged on the land or not. Thus in *Brandt's Appeal*, 8 Watts, on p. 202, we said: "If the sons accepted the lands devised, they became personally liable to pay the legacies, at the times, and in the payment, directed by the will: if not paid, the legatees could sue and recover them by levy and sale of any goods or lands of the devisees." In *Lobach's Case*, 6 Watts, 167, we held that the acceptance of a devise of land charged with the payment of a legacy, creates a personal liability for its payment on the part of the devisee. On p. 170, Kennedy, J.,

speaking of the effect of the acceptance of the land by the devisees, said: "This, perhaps, without more, ought to be considered sufficient evidence, in ordinary cases, to establish an agreement on the part of the devisees to take the lands devised to them upon the terms and conditions set forth in the will; and likewise of an engagement on their part to fulfill and perform them, whatever they may be." See also *Miltenerberger v. Schlegel*, 7 Barr, on p. 243, and the cases there cited. Now an engagement, undertaking, or agreement to pay, is essentially a contract to pay. Such certainly is its status in legal contemplation. The law recognizes and enforces the obligation, and it can only do so upon the footing of a contract. The terms of such contracts as the present are found in the will, and the obligation to comply with those terms is implied from the acceptance of the devise. We do not consider it is any reply to the plea of the statute, to say that this is an action for a legacy, and in such cases the statute is not a bar. That is true in the ordinary actions for legacies against executors, and the reason is that the liability of an executor to pay a legacy is not grounded upon any lending or contract. He is a trustee who is charged by the will with the performance of the duty of paying legacies, and against that form of obligation the statute of limitations is no bar. The case of *Thompson v. McGaw*, 2 Watts, 163, cited for the plaintiffs, is decided upon that very ground. We are, therefore, of opinion that the plea of the statute is a good bar to the cause of action set up in the present case. As Mrs. Etter was *sui juris* more than six years before suit brought, the defense was good as to her.

But the case of Mrs. Snyder stands upon a different footing. She was a married woman at all times since her legacy became due, and she is still married. The learned judge of the court below thought that she could not take advantage of the exception in favor of married women in the act of 1713, and that the plea of the statute was a good bar to her claim also. His reasoning is certainly very forcible if the proposition were as to how the law *ought* to be in such cases. But we must confront the positive terms of a statute directly and literally applicable to the case, and here we consider there is no alterna-

tive. The language of the third section of the act of 1713 is most explicit, and it provides in express terms that several classes of persons under disabilities are not barred by the statute until six years after they have recovered their ability. These persons are, those who are "within the age of twenty years, *feme covert*, *non compos mentis*, imprisoned or beyond the sea." The privilege of freedom from the liability to the statute is common to them all. No one of the classes is more or less entitled to the exemption of the third section than any other. This statutory exemption has never been repealed expressly or by implication. It is the law of the Commonwealth at this day, and we must respect it. The plaintiff, Mrs. Snyder, comes directly within its terms, and is entitled to its benefits. As to her, therefore, the plea of the statute of limitations is no bar, and it is overruled.

The judgment in favor of the defendant as against the plaintiff, Susannah Etter, is affirmed. The judgment in favor of the defendant as against the plaintiffs, Nicholas Snyder and Eliza his wife, in right of the said Eliza, is reversed, and as to them a writ of *venire facias de novo* is awarded.

MATTER OF WESTON.

[91 New York, 502.]

DIRECTION TO CONVERT ESTATE INTO MONEY.—WITHIN WHAT TIME SHOULD BE DONE.

What is a reasonable time within which an executor directed to convert an estate into money must exercise his discretion as to railroad stocks and property generally, depends on the circumstances of each case.

It seems eighteen months may serve as a proper standard in the absence of modifying circumstances.

CROSS-APPEALS from a judgment of the general term of the Supreme Court in the first judicial department, modifying and affirming as modified a decree of the surrogate of New York

county, on the final accounting of the executors of R. W. Weston, deceased.

The will, after certain devises and bequests, directed the executors to convert all the rest, residue and remainder of his estate, real and personal, into money, and to divide the net proceeds into three equal shares, one which he gave and bequeathed to them in trust, with power to invest and keep the same invested in bonds or securities of the government of the United States, whereof the interest was payable in gold, or in such other securities as to them should seem most for the benefit of the fund designed to be created, and to apply the interest, income and profits of such share to the use of his son Warren, until he should attain the age of twenty-five years, and then the share was to be paid over and transferred absolutely to him. The other two shares were in like manner directed to be invested and held in trust, one for the benefit of each of the testator's two daughters during her natural life. The executors were required, as soon as might be after the decease of the testator, to pay and discharge all his just debts. Letters testamentary were issued to the executors in June, 1874.

The principal subjects of controversy were in relation to fifteen hundred shares of the St. Louis and Iron Mountain Railroad Company, part of the assets which were undisposed of at the time of accounting, and in relation to certain real estate situate at Dobbs' Ferry, and expenditures thereon. The material facts in relation to them are stated in the opinion.

George H. Foster & Samuel Hand, for contestants.

A. P. Whitehead, for executors.

FINCH, J. The decree of the surrogate, and the judgment of the general term, refusing to charge against the executors the loss resulting from the depreciation of the St. Louis and Iron Mountain railroad stock, were right and should be affirmed. The appellants do not attack this conclusion upon the ground of negligence or bad faith, and substantially concede that the

discretion of the executors, if they had any, was exercised fairly and with ordinary prudence, although the result has been disastrous. But the argument is put upon the ground that by the terms of the will it was made the duty of the executors to sell "promptly;" that the testamentary direction was "peremptory;" and any delay, not necessary and unavoidable, was a violation of an express duty, and so involved responsibility for loss. But the will contains no such arbitrary or peremptory command. It does direct a sale, but does not say when, or under what circumstances, or at all fetter the usual and ordinary discretion of executors to wait a reasonable time for the proper performance of their duty. What, under all the circumstances, was such reasonable time, and did the executors exceed it, became the vital questions on this branch of the case, and their answer involves a view of the surrounding circumstances, and some just and fair allowance for the peculiar emergency. It must be granted that the stock was somewhat of a dangerous and speculative character, subject to great and sudden fluctuations of value, and not such as a trustee could select for an investment of trust funds without responsibility for a loss. But the executors did not make this investment. They found the stock among the assets. Without their fault it came upon their hands, and they had to care for and dispose of it, with all its inherent risks on the one hand and possibilities on the other. That the testator thought well of it they had ample evidence. He had bought one thousand shares in August and September of 1872, at about fifty-nine per cent., and the remaining five hundred shares later. These last were not paid for by the deceased, but were being carried by his brokers. His death occurred on the 7th of May, 1873, and a memorandum relating to this stock was found among his papers, describing it as "to be held firmly; a dividend expected in two years." The executors thus found themselves confronting an emergency, and with the path of duty before them somewhat blind and difficult. Why the testator should have made the memorandum except for the guidance and enlightenment of those who came after him, it is impossible to say; and while it did not bind them, it was advice they were justified in taking into account. The testator

had acted upon the judgment contained in his memorandum. In January of 1873, the stock had sold at 94, but from that time on, had fallen to 85 at about the date of testator's death. He, therefore, had held it firmly on a falling market, and so strengthened by his conduct the impression left by his written advice. Letters testamentary were granted on the 6th of June, 1873, and the judgment and discretion of the executors was then called into play, for it was possible to sell the stock at once for about 80. Should they do so, or wait, was the important inquiry, to be answered with sole reference to the welfare of the estate committed to their care. They consulted, and took the best advice attainable and determined to wait. The stock had been above par the year before, and under all the circumstances, with the advice and example of the testator both before them, and their own justifiable confidence in the value of the stock, it is quite certain that their conclusion was reasonable, and their delay excusable. As the stock continued to fall, the reason for waiting grew stronger to men who had confidence in its inherent value. After a delay of three months, came a panic in September. A storm of fright and distrust swept over the stock market, during which valuable securities were depreciated and sacrificed, and prices dropped suddenly and low. Certainly it was no time then to sell. The stock was paid for, and the estate strong and able to carry it through the unexpected emergency. If the executors then had lost courage, and, demoralized by the alarm around them, had thrown the stock overboard at 55, or less than its cost, it would have been easy to say that the trustees chose the worst possible time in which to sell, and acted from terror and not from judgment. And so they waited again, as prudent men similarly situated would have certainly done. The depression continued during the remainder of the year, but with symptoms of improvement in the early months of 1874. In February the recovery had brought the stock back to 67. At this point, it is said, the executors should have sold; but while the price was better than that of the panic, it was little better, and still much below its value when originally received. It is easy to see now that it would have been wiser to have sold, and had the executors known

then what they and we know now, they would undoubtedly have done so. But they did not and could not know. The indications pointed to an eventual restoration of value, and we cannot say that it was imprudent or unwise to expect and wait for it. But in April came another heavy fall, the stock dropping to 30, and in June of that year when their inventory was filed, it was appraised at 20, although on the 14th of that month it was selling at 15. That is the history of the first year's holding by the executors. Facts are put in evidence showing the expectation and progress of a movement for consolidation; the persistent holding by one of the executors, through the same period, of stock of the same corporation owned by him individually; and the similar holding of much larger blocks by business men of acknowledged capacity and judgment. Since the value of the stock at the hearing before the auditor was greater than the inventory value of June, 1874, the question of responsibility for loss relates wholly to the omission to sell during the first year. There is, and there can be, no rigid and arbitrary standard by which to measure the reasonable time within which the discretion of an executor directed to convert an estate into money must operate. If, in some instances, the English cases indicate a disposition to fix upon one year, because at that date the executor may be compelled to account, in other instances such fixed or arbitrary standard appears to have been rejected. (*Hughes v. Empson*, 22 Beav. 181; *Buxton v. Buxton*, 1 Myl. & C. 80; *Garrett v. Noble*, 6 Sim. 504; *Bate v. Hooper*, 5 DeG., M. & G. 338; *Morgan v. Morgan*, 14 Beav. 72; *Marsden v. Kent*, L. R. 5 Ch. Div. 598.) The better opinion derived from them would seem to be that each case must stand upon its own facts; that what would be a reasonable time in one instance might not be in another; and while the one year allowed to close the estate may sometimes mark the limit of discretion, and is always a circumstance to be considered, it is not necessarily conclusive. In this State, at all events, there is no arbitrary standard. The executor, here, cannot be compelled to account until after eighteen months; and yet it may be his duty to sell even earlier than that, or to wait even longer, according to the circumstances of particular cases, and the exi-

gencies which exist. Where no modifying facts are shown to shorten or lengthen the reasonable time, the period of eighteen months may serve as a just standard. It was so held by the learned surrogate of New York in the case of *Gillespie v. Brooks*, 2 Redf. 355. There the will directed the executors to invest the residue of the estate, and the duty of selling the bank, insurance, mining and manufacturing stocks on hand was just as plain and necessary as if there had been a specific direction to convert them into money. It was conceded, in that case, and held by the surrogate, that a reasonable time for the disposition of the "irregular securities" would be eighteen months. Subsequently the same doctrine was held in *Lockhart v. The Public Administrator*, 4 Bradf. 21. While such period furnishes a convenient guide where no special circumstances exist, it must, after all, not be taken as a fixed or arbitrary standard. The test must remain, the diligence and prudence of prudent and intelligent men in the management of their own affairs. (*King v. Talbot*, 40 N. Y. 76; *Thompson v. Brown*, 4 Johns. Ch. 627; *McRae v. McRae*, 3 Bradf. 199.) Stocks of variable value ought not to be timidly and hastily sacrificed, nor unwisely and imprudently held. Even where there is a direction to sell, reasonable time must be given, and what that is must be determined in each case by its own surroundings. Here the estate was large. A trust fund was early constituted which furnished enough of income for the immediate wants of the beneficiaries. They made no complaint at the time because the stock in question was held. If the result had been a gain to them they would have been thankful for the delay. For the loss which did result we think, under all the circumstances, the executors should not be charged.

Among other assets left by the testator, and covered by the direction to convert into money, was a country seat of large value, situated at Dobbs' Ferry, and overlooking the Hudson river. The testator owned only the undivided half; his partner, Gray, who became one of the executors, owning the remainder. The property was incumbered by mortgages of \$54,000, which were outstanding and unpaid at the testator's death. The executors tried to sell in the usual and ordinary

way, at private sale, but failed. The range of possible purchasers was narrow. Those who could afford to own and keep up such a residence were not numerous, and the panic of 1873 tended to lessen their number and make them more than usually prudent and cautious. Such offers of purchase as were made fell far below the intrinsic value of the property, and the executors held it. They paid off the mortgages and expended further sums of \$12,576 90, for taxes upon and the care and preservation of the property. Of this last amount, \$5,133 93 was paid during the first eighteen months of the executors' administration; and the balance of \$7,442 97, later. The auditor found that from the testator's death to the date of his report, there had been no such demand for the Dobbs' Ferry property as to establish a market price for it, and that said executors had not been able, by due diligence, to effect a proper sale of the property. He, therefore, allowed the payments by the executors upon incumbrances and for expenses, and the surrogate confirmed the allowance, but the general term reversed so much of the decree as gave credit for the amounts paid upon incumbrances and the expenses incurred, upon the ground that a sale ought to have been made within the eighteen months, and the executors had no authority to pay off the mortgages. In so doing, it was declared, they were neither paying debts, nor converting the property for investment. It is now contended that the general term were wrong for several reasons.

When the original account was filed which claimed the credits in controversy, the contestants filed specific objections. There was a general objection that the executors failed to convert all the property into money, and a special objection on the same grounds, naming the Dobbs' Ferry property, and alleging that the holding of the real estate had involved large expenses for care and management, insurance and other protection of the same and payment of interest thereon. The objections then added: "These objectors accordingly claim that the said executors are liable to make good to the said estate the losses sustained in manner aforesaid, of all which they propose to make proof; and they also object to all such items of extra expenditures contained in the said account as have been occasioned by

the aforesaid acts or omissions of the said executors." There was no objection to the payment of the mortgages. The items of such expenditure were stated in the accounts, but were entirely unchallenged. They were stated, too, as payments to "creditors." They were included in schedule D, which is described in the account as containing a statement of "all the claims of creditors presented to and allowed by us," and "of all moneys paid by us to the creditors of the deceased." The one-half of the mortgages was thus claimed to be a debt of the estate, for which it was liable, and which as a debt had been allowed and paid. To this claim no objection was filed; against it no evidence has been produced, and it will not do now to reject it on the ground that it was not a debt, and the estate was not bound for its payment. But further than that, it also appears that after the close of the evidence before the auditor, and when the contestants knew and understood the exact situation upon the proofs, their counsel formally notified the auditor that they should not press their objection to the account in respect to the North Shore and Staten Island Ferry Company, and the real estate at Dobbs' Ferry. When the case came before the surrogate, the infant contestants, through their special guardian, filed no exceptions to the auditor's report. The adult contestants did, but as to the Dobb's Ferry property the surrogate held that the notice given to the auditor "was equivalent to a withdrawal of the objections referred to, and was done by counsel then representing the contestants, and their action cannot be interfered with by counsel subsequently retained or substituted." We are of the opinion that the surrogate correctly construed the notice and its effect. It amounted to a waiver and abandonment of the objections referred to. Good faith and fairness require that its force should be admitted. It stopped the argument in that direction before the auditor. It, perhaps, prevented an application to the auditor to open the proofs and take further evidence, and certainly, as we have seen, influenced and controlled the action of the surrogate. We do not see how we can justly disregard it. The ground taken by the general term is based upon the fact that the guardian for the infants did not unite in the notice. That is true, but he not only filed no exceptions to the auditor's re-

port, but did not appeal from the decision of the surrogate. He is not here. The rights of the infants are not before us. The only persons before us and prosecuting the appeal, are the very contestants, and those only, who withdrew these objections. They are bound by their own action, and the infants by the decree from which they did not appeal. So far then as the payment of incumbrances is concerned, we must hold they were debts for which the testator was personally liable. They are claimed to be such in the account; credited as such; not objected to, and we do not feel at liberty to charge the executors by presuming there was no bond or personal covenant. What remains is the question as to taxes and expenses incurred by reason of not selling the land. As to so much of these as accrued after the eighteen months, there would be room for very serious debate had not the objection been formally withdrawn. There was justice and fairness in that withdrawal. The evidence had shown that at the worst the executors, acting in good faith, and trying to do their duty, had only been guilty of an error of judgment. The contestants concluded either that no liability followed, or if it did, that it would be harsh and hard to enforce it, and so gave the notice which practically withdrew the objection. To allow them now to take back their notice and insist on the objection would permit one to trifle with the administration of justice in a manner which we cannot approve. We must, therefore, agree with the surrogate and disagree with the general term as to the items relating to the Dobbs' Ferry property.

Both sides complain of the disposition made of the allowances granted by the surrogate. He awarded \$7,500 to the executors for a counsel fee, to the contestants \$1,000, and to the guardian *ad litem* of the infants \$2,000. These allowances were made upon the authority of the law of 1870 (chap. 359, § 12); and the general term held that the repeal of that act in 1880 (chap. 245), did not prevent its application to the present case, but its just construction was subordinate to the provisions of the Code limiting the total allowance to \$2,000. In that we think the general term was right. In *Noyes v. Children's Aid Society*, 70 N. Y. 481, we held that in giving allowances under the act of 1870, the surrogate is confined to the "man-

ner" laid down in sections 308 and 309 of the Code, and cannot exceed the maximum limit of the amount which may be allowed, fixed by said sections, and must follow the process by which that amount may be arrived at, which is prescribed therein. The general term has followed and acted upon that decision, not only in the present case but in others. (*Down v. McGourkey*, 15 Hun, 444; *Hurd v. Warren*, 16 Id. 622.) All that is now urged to the contrary is a suggestion of harmful consequences, and that the limit of \$2,000 was never intended to be made applicable to "the long and expensive contests" in the surrogates' courts. We think it was, and are not without hopes that its effect will be to shorten their duration and render them less expensive, without at all endangering the ability of executors and administrators to defend themselves and the estates which they represent.

The appellants, however, insist that the power to make allowances is still further limited by the provisions of the Code of Civil Procedure, and those apply, because the costs were taxed in October, 1880, and after that Code took effect. Its own provisions leave it not applicable. By section 3347, subdivision 11, the eighteenth chapter, among others, is made applicable only to an action or special proceeding commenced on or after September 1, 1880, except as to certain sections which do not affect the question of costs before us. We see no reason, therefore, for disturbing the conclusion of the general term upon the subject of the allowances. Other questions raised in the case have been examined, but need not be specially considered.

The judgment of the general term, so far as it modifies the decree of the surrogate, by refusing credit to the executors for the amounts paid upon incumbrances, and for taxes and expenses on account of the Dobbs' Ferry property, should be reversed, and in other respects affirmed with costs to the executors, to be paid out of the estate.

All concur.

Judgment accordingly.

FELLOWS vs. LONGYOR.

[91 New York, 324.]

BONUS TAKEN BY GUARDIAN ON LOAN OF ESTATE FUNDS NOT USURY.

The reception by a guardian of a bonus upon the loan of estate-moneys does not make the transaction usurious within the statute.

APPEAL from a judgment of the general term of the Supreme Court in the fourth department affirming a judgment at special term in plaintiff's favor.

The opinion states the facts.

F. Brundage, for appellant.

Geo. W. Cothran, for respondent.

RUGER, Ch. J. This action is brought to foreclose a mortgage of \$5,000, given March 29, 1870, by appellant, Frances Longyor, to one Abner P. Downer, guardian, etc., upon lands in Niagara county. The mortgage was assigned by Abner P. Downer, guardian, etc., to the plaintiff, on the 12th day of June, 1876, which assignment contained a covenant on the part of the said Downer that the sum of \$5,322 was unpaid thereon, that there were no defenses or offsets to said mortgage, with a guaranty of its collection.

The whole sum secured to be paid becoming due in May 1878, this action was commenced to foreclose. The mortgagor, Frances Longyor, answered, pleading the defense of usury, alleging that the mortgage was given by the defendant to Abner P. Downer to secure a loan of \$5,000, and that it was, at the time of such loan, corruptly and against the form of the statute, agreed between the defendant and Downer that she should pay him the sum of \$300 for the loan and forbearance of said money; that the loan was afterward made and the \$300 paid to Downer by defendant.

Upon the trial the proof established and the court found

the following facts among others: that Abner P. Downer was, at the time of this transaction, the duly appointed guardian of his infant brother and sister, William V. Downer and Alice M. Downer; that he had accepted the office and executed bonds for the faithful performance of his duties, and that from the funds belonging to his wards the loan in question was made; that in February, 1870, one John H. H. Clark, the son of the defendant Frances Longyor, was the owner of a bond and mortgage given to him by his mother, to secure the sum of \$2,270 with interest; that the defendant, being desirous of borrowing a sum of money, authorized Clark to obtain it; Clark applied to Downer for a loan which resulted in an agreement "that Downer should purchase of Clark his bond and mortgage of \$2,270 and loan Frances Longyor the additional sum of \$5,000, and that Downer, for the purchase of the bond and mortgage, and for making the loan, should be allowed a discount from the amount due on the Clark bond and mortgage, of the sum of \$471 48. This transaction was consummated by the assignment by Clark to Downer of his mortgage, and the payment to him by Downer of the amount secured by this mortgage, less the sum of \$471 48.

Afterward, and on the 29th of March, 1870, the defendant, Frances Longyor, executed to Abner P. Downer, guardian, etc., to secure the loan to her, the bond and mortgage in suit, and upon its delivery to Downer, received from him, through her agent Clark, the full sum of \$5,000.

The court further found that the sum of \$471 48, agreed to be deducted from the face of the Clark bond and mortgage, was fixed upon and deducted as a sum to reward Abner P. Downer, personally, for making such purchase and loan, and was so understood by both parties, and it was not intended by Downer that it should be paid over to the persons for whom he was guardian; that Clark and Longyor both knew at the time of the making of this purchase and loan that the moneys used for that purpose belonged to the funds in Downer's hands as guardian of his brother and sister, and that it was the purpose and intention not only of Downer, but also of Mrs. Longyor and her agent Clark, to have the bond and mortgage in ques-

tion made payable to Abner Downer as such guardian. The court also found that at the time of the trial the general guardian had settled with and paid his wards, but when did not appear; and finally that this transaction was not usurious, and that the securities were valid in the hands of the plaintiff. The above are substantially all of the findings material to the questions raised on this appeal.

There is no evidence or finding as to the actual value of the Clark mortgage at the time of this transaction. Neither is there any finding as to what specific sum, if any, was to be allowed to Downer for the loan of the \$5,000. The court refused to find that the sum of \$300 was to be allowed for such purpose. We are now asked to reverse the judgment rendered upon this report, and to declare the transactions in question usurious as matter of law.

Decisions are quite numerous to the effect that the purchase of interest-bearing notes or mortgages at less than their face value, though their payment be guaranteed by the vendor, are not necessarily usurious. (*Brooks v. Avery*, 4 N. Y. 225; *Cram v. Hendricks*, 7 Wend. 569; *Thomas v. Fish*, 9 Paige, 478; *Catlin v. Gunter*, 11 N. Y. 368; *Cobb v. Titus*, 10 Id. 198.) There is no presumption that a mortgage is of the value of the sum appearing as unpaid thereon, especially when it is transferred in connection with a loan which is claimed to be usurious on account of the difference between the price paid and the amount purporting to be unpaid thereon.

Savage, Ch. J., says: "Usury is a defense which must be strictly proved, and the court will not presume a state of facts to sustain this defense where the instrument is consistent with correct dealing." (*Marvin v. Feeter*, 8 Wend. 533. See, also, *Smith v. Marvin*, 27 N. Y. 142; *Mutual Life Ins. Co. v. Kashaw*, 66 Id. 544; *Thomas v. Murray*, 32 Id. 610.)

From the findings in this case, and the absence of any proof of value, we might well presume that the price paid by Downer for this mortgage represented its actual value. To hold otherwise would require us to decide as matter of law, in order to support a defense of usury, that this mortgage was of greater value than the price paid, although the findings of the court

Below are not inconsistent with the fact that the mortgage may have actually been worth much less. But it is unnecessary, and perhaps, under the peculiar condition of the findings in this case, improper to dispose of the case upon this ground, as we think the judgment sustainable upon another theory. The funds with which this loan was made did not in equity belong to Abner P. Downer, but were the property of an estate of which he was the representative. He could not use those funds for his own purposes, and had the right to invest them only in obedience with settled rules of law relating to the investment of trust funds. These rules forbid their employment in illegal or speculative transactions as well as in the purchase of doubtful and indiscriminate securities.

It was said by Judge Woodruff, in the case of *King v. Talbot* (40 N. Y. 84): "It is not true that there is no underlying principle or rule of conduct in the administration of a trust, which calls for obedience. Whether it has been declared by the courts or not; whether it has been enacted in statutes or not; whether it is in familiar recognition in the affairs of life, there appertains to the relation of trustee and *cestui que trust* a duty to be faithful, to be diligent, to be prudent in an administration intrusted in the former, in confidence in his fidelity, diligence and prudence."

"This necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and, of course, everything that does not take into view the nature and object of the trust, and the consequences of a mistake in the selection of the investment made."

The guardian, Abner P. Downer, stood in the relation of an agent to this property; not only that, but an agent bound in law to execute his power over the funds in a special, limited and lawful manner, and who could be relieved from this duty only by the order of a court having jurisdiction of the matter. The defendant knew the limit and extent of the trustee's authority, for that was defined by rules of law, of which she, like all others, must be presumed to have had knowledge. Knowing this, she approached the guardian to procure moneys belonging to this estate, and sought to accomplish her purpose by

offering a personal inducement to the custodian of these funds. It is impossible to hold that this transaction was usurious. A trustee, although he may be vested with title to the trust fund, has a mere naked title, without any proprietary or disposable interest in the property. His power over it is limited either by known rules of law or those capable of easy ascertainment, and he cannot be considered the lender of the trust funds within the meaning attached to that term by our statutes relating to usury. By the contract of loan, the real lenders were not to receive anything in excess of legal interest.

The principles frequently declared by this court seem to preclude any view of this transaction which would lead to a contrary conclusion. The cases are quite numerous to the effect that where an agent loans moneys belonging to his principal, and as a condition of the loan receives a bonus from the borrower for his own benefit, without the knowledge, consent, or authority of his principal, the security taken for such loan is not thereby rendered void for usury. (*Condit v. Baldwin*, 21 N. Y. 219; *Bell v. Day*, 32 Id. 168; *Estevez v. Purdy*, 66 Id. 446; *Mutual Life Ins. Co. v. Kashaw*, *supra*.) In analogy with this principle, we think the transaction in question was not usurious. The borrower here was informed that the funds proposed to be used were not the individual funds of Abner P. Downer. She treated with Downer as the representative of principals who were the real owners of the fund from which the loan was made. Not only this, but she also knew that these were trust funds, subject in their disposition and control to the rules governing the investment of trust estates, and from the very nature of the case that their custodian was forbidden by law from engaging in illegal transactions with such funds. She entered into this contract, therefore, knowing that Downer did not, and could not, have authority to enter into a usurious contract on behalf of his principals; not only this, but she did not pay, or agree to pay, the actual owners of the funds a bonus, but agreed to pay it to Abner P. Downer for his individual use. By the terms of the agreement the real lenders in this case were not to receive, either directly or indirectly, anything beyond legal interest and the repayment of the money actually

loaned. If an adult can be relieved from an apparently usurious contract made by his agent, upon the ground that the usurious premium was taken and retained by such agent without the principal's knowledge, authority or consent, how much stronger is the position of an infant, the disposition of whose property is environed by stringent legal rules, and who is always subject to the disabilities of non-age, rendering him incapable of binding himself, either by acquiescence or consent.

It is quite unnecessary to discuss the effect of a subsequent ratification by the principal, upon the loan, and the subsequent relations of the agent to the principal, for this case is destitute of evidence of ratification. It is enough to say that it would have no different effect than that of a subsequent ratification in the cases of *Condit v. Baldwin*, and others above cited. The acceptance of the security, and bringing suit thereon by the principal with knowledge of the act of the agent, is not a ratification. (*Estevez v. Purdy*, *supra*; *Stout v. Rider*, 12 Hun, 574.) Especially would this be so, if knowledge of the transactions attending the loan is not brought home to him.

The position urged by the counsel for the appellant, that this loan must be regarded as an individual transaction between Abner P. Downer and the defendant, although he was described in the bond and mortgage as Abner P. Downer, guardian, etc., cannot be maintained. It is thought to be supported by a line of cases holding that an addition to the name of a contracting party, of his title or office, does not deprive the contract of its personal character. These authorities have no application to this case. They relate only to the liability of the person employing such title in an action between him and a third party. (*Sutherland v. Carr*, 85 N. Y. 110.) The question here is that of the ownership of the moneys represented by this mortgage, and is to be determined by the principles governing the ownership and management of trust estates. The words "guardian, etc.," inserted in the securities in question, operated as notice to the defendant Longyor, of the rights of the wards of whom Downer was guardian. (*Pendleton v. Fay*, 2 Paige, 202; *Budd v. Munroe*, 18 Hun, 316; *Duncan*,

v. *Jaudon*, 15 Wall. 165; *Shaw v. Spencer*, 100 Mass. 389; 1 Am. Rep. 115.)

It is repugnant to the equitable principles controlling the management and disposition of trust estates to say that a trustee can acquire an interest in trust property as against his *cestuis que trust*, merely by dealing with it in his individual name. (2 Perry on Trusts, § 836.) The circumstance that a trustee has given a bond for the faithful performance of his duties does not affect the application of these principles. Such security is usually given upon the appointment of a trustee by a court, and in the case of many other trusts, and yet it has never been supposed that this fact in any way impaired the remedies open to the beneficiaries of a trust, or had any other effect than to give them the additional security furnished by the bond. The *cestuis que trust* have the option to prosecute the trustee and his bond, or to follow and reclaim the property. (2 Perry on Trusts, § 843.)

In conclusion we say that, while there may be trusts of such a character that an illegal and usurious loan of the funds belonging to them will render the securities taken therefor void, in the case at bar we are satisfied that it would be inconsistent with well-established principles to hold that the loaning of the moneys of an infant by his legal guardian is usurious, although the guardian exacted more than lawful interest for the loan.

The judgment appealed from should, therefore, be affirmed. All concur.

Judgment affirmed.

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ROACH *vs.* AMES.

[80 Kentucky, 6.]

EXECUTION OF CONTRACT BY ADMINISTRATOR OF INSOLVENT ESTATE.

An administrator who acts in good faith and executes a contract made with decedent for the delivery of personal property, paid for before his death, the breach of which would result in damage to the estate, will not be responsible, although the estate is insolvent.

Spalding & Spalding, for appellants.

C. Bennett and *C. C. Rose*, for appellees.

PRYOR, J. By section 33 of the General Statutes, chapter 39, all debts and liabilities of a decedent are of equal dignity, and to be paid ratably in the administration of the estate, except certain liabilities therein specified; and by section 42 of the same chapter, when the personal representative has paid to a creditor, etc., an undue proportion of his demands, he may recover from the creditor, distributee, or devisee the amount of overpayment, with the interest thereon. In the case before us, the intestate, W. E. Ames, in his lifetime, sold to Buckingham and Field his crop of corn, estimated at 12,000 bushels, which Ames was to shell, sack, and deliver between the first and last of March, to be good, sound, merchantable flint corn, put up and delivered in good order, at the price of forty-five cents per bushel, to be paid for on delivery by the vendees. At the time of the sale, and shortly after, the purchasers paid to Ames, on this sale, the sum of \$2,233 26. Ames, before the corn was delivered, died, and the appellee, James H. Dyer, was appointed his administrator. The corn was shucked and in pens at the death of the intestate, to enable him to comply with his agreement, and when the appellee administered, he delivered the corn, and received the balance of the purchase price, with which he has charged himself as administrator.

The appellee, finding that liens had been asserted by certain

creditors on portions of the estate of his intestate, filed a petition in equity asking for an ascertainment of the liens, and a reference to the commissioner for the purpose of auditing his accounts and settling the estate. An amended petition was also filed, in which the insolvency of the estate is alleged by reason of the numerous claims that are being presented, and the chancellor is called upon to settle it as an insolvent estate. The petition and amendment were both filed after the corn had been delivered to the vendees by the administrator. The appellants, who were creditors, filed answers, as well as exceptions to the commissioner's report, by which they seek to make the administrator liable for delivering the corn, insisting that the purchasers, Buckham and Field, were not entitled to the corn, and could only recover the amount of money advanced on their purchase; that, as to this money, they occupied the position of a general creditor. If, by the terms of the contract, the title passed to the corn at the time of the sale, then the creditors can assert no claim as against the administrator; but without determining this question, it seems to us the personal representative should not be held responsible.

The particular corn *delivered* was the subject of the agreement between the parties. It had been placed in pens ready for delivery, and the sum of \$2,233 advanced upon it by the purchasers. It was a contract, the violation of which subjected the estate of the intestate to damages, and it was with the personal representative, under the circumstances, to determine whether he would comply with the terms of sale by delivering the corn, or refuse to do so, and thereby make the estate liable not only for the money advanced upon it, but for such damages as the purchaser would be entitled to recover for the breach of the agreement.

It was certainly not such a fixed or ascertained liability as that of an ordinary debt, but involved the question only as to whether the personal representative should comply with the agreement, or subject the estate to damages. If corn had advanced a dollar on the barrel, the creditor might then have been heard to complain of the failure of the administrator to execute the contract of his intestate. It is evident the ap-

pellee was not aware of the insolvency of the estate at the time he delivered the corn, and the only question really involved is, did the administrator act in good faith when executing the contract? This is not an ordinary demand, such as is contemplated by the statute, that, when discharged, must be done at the risk of the personal representative. So far as the estate is concerned, it not only involved the repayment of the moneys advanced, but damages for the non-delivery of the property purchased, and the administrator, exercising a discretion as to his duty, complied with the terms of the contract, and relieved the estate from a litigation that must have resulted in the assessment of damages against it, as well as a recovery of the principal sum advanced. He may have supposed that the title passed to the vendee, as is insisted by his counsel in argument here; but whether he did or not, his action was within the range of a discretion he had the right to exercise, and the creditors should not complain. An administrator is entitled to the presumption of good faith in the discharge of such duties as are not defined by statute, like any other trustee. Section 33 of chapter 39, General Statutes, was not intended to compel the administrator to submit to an action for damages, for the purpose of settling such unliquidated demands as this, but it is his duty to do that which, in the exercise of a proper discretion, he thinks best for the interests of the estate.

Under the ancient rule with reference to the payment of debts, the liability of the administrator depended principally upon his good faith and vigilance in ascertaining their justice; and in equity, when the personal representative acted in good faith and paid debts or claims when there was a deficiency of assets, he was entitled to relief. (Story's Equity Jurisprudence, vol. I, p. 95; 3 Dana, p. 41.)

While the relief in such cases is now regulated by statute, it by no means follows that in the class of cases before us all discretion is withheld from the personal representative, and he is compelled to submit to the costs of expensive litigation in order to settle that which, as a prudent business man, he could determine without involving the estate in costs. The damages in this case, may, and, doubtless, under the proof, would not

have been heavy against the estate; still, this court will not speculate on such a result, and when the administrator in good faith has complied with a contract made by his intestate for the delivery of property that had been paid for, and the breach of which would have resulted in damages and costs against his estate, the chancellor will not hold the personal representative responsible when the entire proceedings shows that he acted in the best of faith. The claim of Matthias' executor was properly disregarded; the corn had been removed from the rented premises for several months, and the lien as to the creditors was gone. The judgment below in each case is affirmed.

Execution of testator's contract by administrator or executor.—It is a general rule of law, that the personal representatives are responsible to the extent of the assets that come to their hands, upon all the contracts of their testator or intestate, whether they are deeds, or contracts by record, or simple contracts, and whether "the executors and administrators" are named in the contract, or whether they are not, and whether the breach has been incurred in the lifetime of the decedent or after his decease. *Woods v. Ridley*, 27 Miss. 119.

At common law, if an executor or administrator undertook to perform the contracts of the decedent, it was upon his own personal responsibility, so that if losses were sustained he was required to bear them, while, if profits were realized, they were assets in his hands for the benefit of the estate. *Smith v. Wilmington Coal Co.* 83 Illinois, 498; *Mowry v. Adams*, 14 Mass. 327; *Mills v. Murray*, 4 Exch. 868; *Howard v. Wheatley*, 22 L. J. Ch. 435.

But this hard rule of the common law is relaxed in equity and by statute in England, and in most if not all of the States of the Union. 22 and 23 Vict. c. 35, § 27; *Clegg v. Rowland*, L. R. 8 Eq. 368; *Davis v. French*, 20 Maine, 21; *Ellis v. Merrinan*, 5 B. Mon. 296.

It is now generally a question of honesty and due diligence. *Meeker v. Vandervart*, 15 N. J. Law, 392; *Laughlin v. Lorenz*, 48 Penn. St. 275; *Davis v. Lane*, 11 N. H. 512; *Gray v. Hawkins*, 8 Ohio St. 449; *Getz's Estate*, 12 Phila. (Pa.) 143.

The personal representative must even dispute and avoid any illegal contract made by the decedent, or one corrupt and contrary to good morals. *Eabanks v. Dobbs*, 4 Arkansas, 173; *Ross v. Hardin*, 44 N. Y. Super. Ct. 26; *Martin v. Root*, 17 Mass. 222; *Cross v. Brown*, 51 N. H. 486; *Welsh v. Welsh*, 105 Mass. 329; *McLean v. Weeks*, 61 Maine, 227; *Doe v. Clark*, 42 Iowa, 128.

The duty of the personal representative extends to executory contracts as well as to others. *Warner v. Humphrey*, 2 M. & G. 853; *Collinson v. Lister*, 20 Beav. 365; *Wentworth v. Cook*, 10 Ad. & E. 42.

But the executory obligation must have been founded in contract, hence gifts *causa mortis*, not fully completed by the decedent, cannot be enforced against the executor or administrator. *Hooper v. Goodwin*, 1 Swanst. 485; *Shurtleff v. Francis*, 118 Mass. 154; *Bell v. Hewitt*, 24 Indiana, 280; *Baxter v. Gray*, 3 M. & G. 771; *Niels v. Smith*, 14 Vesey, 491; *Egerton v. Egerton*, 17 N. J. Eq. 419.

It is held in Alabama, that the duty of the personal representative is confined to carrying out existing contracts, and that he may not make new ones without an order, by the decedent, for carrying on the business. *Hollingsworth v. Hollingsworth*, 65 Ala. 321. But see, also, *Bowker's Estate*, 12 Phila. (Pa.) 88.

But this duty does not, in any event, extend to contracts of the decedent as to trusts. It is only his duty to settle the accounts and close up the trust. *Little v. Walton*, 23 Penn. St. 164; *Bowman v. Raineteaux*, 1 Hoffm. (N. Y.) 150.

As an exception to the general rule, that the contracts of the decedent devolve upon the personal representative, is to be noted in the case of such contracts as are of a personal nature, or necessarily limited to the lifetime of the decedent. All such contracts die with the person, as, for example, contracts of an author or poet; or skilled artizan, as an architect or builder; or soldier. In such contracts it is to be assumed that death is a cancellation of the obligation. *Aiboni v. Kirkman*, 1 M. & W. 423; *Robinson v. Davison*, L. R. 6 Ex. 269; *Blood v. Winstead*, 23 Penn. St. 316; *Siler v. Gray*, 86 N. C. 566; *Coke v. Colcroft*, 2 Wm. B. 856; *Bradbury v. Morgan*, 1 H. & C. 249.

There is special force, in this exception, in the case of employer and employed. *Tasker v. Shepherd*, 6 H. & N. 575; *Campanari v. Woodburn*, 15 C. B. 400.

In Massachusetts it is held that an executor is not liable for the expense of a child placed at a boarding-school by the decedent in her lifetime. *Browne v. McDonald*, 129 Mass. 66.

See also, as to the personal element in contracts, of a decedent, *Collamore v. Wilder*, 19 Kansas, 16; *Succession of Gayle*, 27 La. Ann. 547; *Gouldsmith v. Coleman*, 57 Ga. 425; *McGill v. McGill*, 2 Metc. (Ky.) 258.

LENT vs. HOWARD.

[89 New York, 169.]

RENTS AND PROFITS INTERMEDIATE TESTATOR'S DEATH, AND EXERCISE OF POWER OF SALE.—POWER OF SALE, WHEN IMPERATIVE.—COMPENSATION OF EXECUTOR BEYOND STATUTORY FEES.

At law the rents and profits of land intermediate the testator's death, and the exercise of a power of sale, belong to the holder of the legal title; in equity, if the power operates as an intermediate conversion of the land into personalty, such profits are a part of the fund and should be accounted for by the heir to the executor, and by the latter to the beneficiary.

Where the general scheme of the will requires a conversion, the court will construe a power of sale as imperative, although the donee of the power is vested with a discretion as to the time of sale.

Where an executor renders services to an estate outside his executorial duties, as in managing and improving for many years farm lands, crediting the profits to the estate, he is entitled to suitable compensation for his services in addition to his statutory fees, and a legacy from testator.

If a trustee neglect to invest funds held by him, within a reasonable time, six months being usually allowed, he is *prima facie* chargeable with interest, and he has the burden of proof, upon an accounting, to justify the delay.

APPEAL from a judgment of the general term of the Supreme Court in the fourth department, affirming a judgment upon the report of a referee.

Action by the widow and only child of John H. Lent, deceased, against the latter's executors, for an accounting and transfer of portions of testator's estate to plaintiffs. The portions of the will in controversy are :

" *Item third.* * * * And I also give, devise, and bequeath unto my said wife, Hattie R. Lent, the use, occupation, and enjoyment of my homestead farm and premises, containing about two hundred acres of land, situate on the north side of Main street, in Le Roy, for and during her natural life, free of rent, and at the decease of my said wife, I give, bequeath, and devise my said homestead farm to my said daughter, Lucy M.,

her heirs and assigns forever in fee; and in case my said daughter, Lucy M., should die before my said wife, without leaving lawful issue, then I give and devise my said home stead farm to my said wife absolutely in fee, her heirs and assigns, forever."

"*Item fifth.* I hereby will and direct my said executors to set apart and invest the further sum of ten thousand dollars (\$10,000) out of my personal property or estate, on bond and mortgage on unincumbered real estate, worth double that amount on semi-annual interest, the interest on such sum, or so much thereof as may be necessary, I direct to be expended annually by my said executors for the support, maintenance and education of my said daughter, Lucy M., during her minority, and in case the interest or income of said sum shall be more than sufficient for the purpose above expressed, then I direct that the surplus thereof shall be added to and become part of the principal sum to be invested as aforesaid; and I further direct, that on and after my said daughter, Lucy M., shall attain the age of twenty-one years, the said sum shall continue to be invested by my said executors, or the survivor of them, as above directed, and the interest thereon to be paid to her semi-annually during her natural life; and in case my said daughter shall die before my said wife, without leaving lawful issue, then I direct that the said principal sum above set apart for her benefit shall be paid to my said wife, to have, hold and use the same, and to her heirs and assigns, forever.

"*Item sixth.* I give and bequeath to my said wife, Hattie R., an annuity of seven hundred dollars, to be paid to her semi-annually during her natural life, and direct my said executors to set apart and invest out of my personal estate a sum sufficient to produce such annuity, to be invested on bond and mortgage on unincumbered real estate at least double the amount, and if my said daughter survives my said wife, then my said daughter, Lucy M., is to inherit this annuity absolutely, and in that case I give and bequeath such annuity unto my said daughter, to be paid and invested as above directed."

"*Item eighth.* I give to my executors, each, the sum of one

thousand dollars, over and above fees for executing this my will.

"Item ninth. I hereby authorize and empower my said executors, or the survivor of them, to sell all of my real estate and convert the same into money (except my said homestead farm), at such time or times, and at such prices as shall to them seem best for the interest of my estate, and to carry out any and all contracts executed by me; and I further direct my said executors, after paying debts and carrying out the provisions of my will as above directed, to invest all the balance and remainder of my estate remaining in their hands on bond and mortgage on unincumbered real estate, worth double the amount, on semi-annual interest, or in State stocks of New York, or both, as to them shall seem best for the interest of my estate.

"The one equal half of such balance or remainder I give and bequeath to my said daughter, Lucy M., to be paid to her on her attaining twenty-one years of age, and to her heirs and assigns forever, except in case she shall die before my said wife without leaving lawful issue, then such balance or remainder to be paid to my said wife absolutely. The other one-half of such balance or remainder I give and bequeath to my said wife, Hattie, to be paid to her at the expiration of ten years after my decease, her heirs and assigns. In case she dies before my said daughter, then the said one-half last above mentioned to be paid to my said daughter absolutely.

"The above provisions and bequests to my said wife to be in lieu of her dower out of my estate.

"Hereby revoking all former wills or codicils by me made.

"And I hereby constitute and appoint my wife, Hattie R. Lent, E. Nelson Bailey and Hayden U. Howard, executrix and executors and trustees of this my last will and testament.

"And I do appoint my said wife guardian of my said daughter, and in case of her decease before the majority of my said daughter, then I appoint Hayden U. Howard her guardian."

William F. Cogswell and George Bowen, for appellants.

M. H. Peck, for respondents.

ANDREWS, Ch. J. We are of opinion, that the executors were properly held to account for the rents and profits of the real estate received by them, and for the proceeds of sales of real estate made under the power conferred by the will.

It is undoubtedly true, that the executors did not take a legal estate in the lands of the testator. They were vested simply with a power of sale, and there being no specific devise of the lands, the title descended to the heirs of the testator, subject to the execution of the power (1 R. S. 722, § 56), and the right of possession followed the legal title. But while at law the rents and profits of land are incident to the possessory right and belong to the holder of the legal title, they may in equity belong to another. Where by a will a bare power of sale is given to executors, and the lands meanwhile descend to the heir, the latter is at law entitled to the intermediate rents and profits, but if the power of sale operates as an immediate conversion of the land into personalty, accompanied with a gift of the proceeds, then in equity the intermediate rents and profits go with, and are deemed to be a part of the converted fund, and the heir may be compelled to account therefor to the executor. (*Stagg v. Jackson*, 1 N. Y. 206; *Moncrief v. Ross*, 50 Id. 431; *Lancaster v. Thornton*, 2 Burr. 1028; *Yates v. Compton*, 2 P. Wms. 308; *Ram on Assets*, 83.) In *Moncrief v. Ross*, the action was by the heir against the executor to compel the latter to account for intermediate rents of real estate descended to the heir, subject to an immediate and imperative power of sale in the executor, and the relief was denied on the ground that the rents were assets in the hands of the executor. It appeared in that case that the executor had received the rents of the real estate, but under what circumstances the case does not disclose. The remedy of an executor to recover the intermediate rents and profits of land descended to the heir, subject to an immediate and imperative power of sale and a gift of the proceeds to other persons, would seem to be in equity only. The legal possession of the land is in the heir, and not in the executor, and the latter cannot at law recover possession, or exclude the heir therefrom. The heir may be compelled to account, and other equitable remedies may doubtless

be resorted to by the executor to prevent spoliation, in the nature of waste, to the injury of the legatees of the proceeds.

We think there was by the ninth section of the will in question, a conversion of the testator's real estate (except the homestead farm) into personalty as of the time of his death, and a gift of the converted fund, together with the intermediate income, to the testator's wife and daughter, with cross-remainders. It is true that the power of sale is not in terms imperative. The words are those conferring authority, and not words of command or absolute direction. But it is clear that a conversion was necessary to accomplish the purpose and intention of the testator in the disposition of the proceeds, and when the general scheme of the will requires a conversion, the power of sale operates as a conversion, although not in terms imperative. (*Dodge v. Pond*, 23 N. Y. 69.) The conversion also will be deemed to be immediate, although the donee of the power is vested for the benefit of the estate, with a discretion as to the time of sale. (*Stagg v. Jackson*, *supra*; *Robinson v. Robinson*, 19 Beav. 494.) We are therefore of opinion, that the rents and profits of the real estate received by the executors and the proceeds of sales, were properly brought into the accounting.

But a serious question arises, which is not free from difficulty in respect to the claim of the defendant, Bailey, to an allowance for services in taking charge of and managing the farms and real estate of the testator, after his death. The testator left five farms (including his homestead farm), all but one of which were in the county of Genesee, and also several houses and lots in the village of Le Roy, in that county. The defendant Bailey, was the brother of the testator's wife, and the defendant Howard, her brother-in-law. Howard was a banker living at Batavia; and Bailey was a farmer and miller, living several miles from Le Roy. After the testator's death he changed his residence, removed to Le Roy, and took charge of all the real estate belonging to the testator at the time of his death, including the homestead farm, which was devised to the testator's wife for life. He continued in charge of the real estate (except two farms, sold,) working upon, managing and

improving it, and receiving the rents and income until March, 1878, a period of nearly fifteen years, and the services performed by him, as the referee found, exceeded in value his commission as executor, and the legacy of one thousand dollars given him by the will. The defendant Bailey, took charge of the real estate at the request of the other executors, including Mrs. Lent, and the homestead farm was managed by him in the same way as the other real estate. It is clear that the executors supposed that the management and control of the real estate devolved upon them as such. The gross rents and income were entered in the executor's accounts, as were also the disbursements for taxes, repairs, labor, seed, etc. The general rule is well settled, that the commissions allowed by statute to executors measure the compensation to which they are entitled for their services in the execution of the trust. An executor, or trustee, empowered to manage an estate, may employ a clerk or agent, and charge the estate with the expense, when from the peculiar nature and situation of the property, the services of a clerk or agent are necessary, and he will be allowed expenses of keeping up the estate, and for taxes, repairs, etc. But executors cannot employ one of their number as clerk and allow him a salary, nor will an executor be allowed compensation for his own services as attorney in the affairs of the estate. (*Vanderheyden v. Vanderheyden*, 2 Paige, 287; *Clinch v. Eckford*, 8 Id. 412; *Collier v. Munn*, 41 N. Y. 143; *Perry on Trusts*, § 913.) The principle is, that for the personal services of an executor or trustee in the discharge of executorial duties, or those which pertain to his trust, the commissions allowed by law are deemed to be a full equivalent. We are not disposed to impair the force of this statutory rule, although in some cases the statutory compensation may be quite inadequate. But we think the rule does not fully or justly apply to the claim of the defendant Bailey, to be allowed out of the gross rents and profits of the real estate a suitable compensation for his services in the nature of a charge thereon, for his labor expended in producing them. It was no part of his executorial duty to spend his time and labor in conducting the business of carrying on the farms. Clearly there can be no

ground for claiming that he owed any duty whatever in respect to the homestead farm; but as has been said, this farm was managed in the same way as the rest. The executors were not entitled to the possession of the testator's real estate. The control and management was apparently surrendered to Bailey by the consent of all the parties in interest. In accounting, the executors should be charged with the net income and profits, and we think a reasonable compensation to Bailey for his services and labor is a proper element to be considered in ascertaining them. This conclusion renders a reversal of the judgment necessary.

There is another important question in respect to the interest charged against the executors on uninvested balances in their hands from time to time. The referee charged them with interest on such balances, at the rate of six per cent. per annum, amounting in the aggregate to about \$20,000. The account rendered seems to show that the estate earned an average of more than five and one-half per cent, per year, from the death of the testator, up to the time of the accounting. There is no affirmative evidence that the executors negligently kept the fund uninvested, and there is some evidence that they made efforts to keep it at interest. They were directed by the will to invest the funds of the estate, on bond and mortgage, or in State stocks, of the State of New York. It is the duty of trustees, guardians, etc., holding funds for investment, to use due diligence to keep them invested. (*DePeyster v. Clarkson*, 2 Wend. 77.) Some time usually elapses before investments can be made, and in charging a trustee with interest, six months from the time the money was received is usually allowed as a reasonable time. (*Dunscumb v. Dunscumb*, 1 Johns. Ch. 508.) After a reasonable time, trustees are *prima facie* liable for interest, and if they have retained money uninvested beyond such reasonable time, the burden is on them, on an accounting, to explain or justify it. If the executors in this case negligently omitted to make investments, or keep the fund idle for personal reasons, or if on the accounting, they render no explanation of the delay, interest may properly be charged against them, computed upon the principle adopted

by the referee. (*King v. Talbot*, 40 N. Y. 76.) The facts bearing upon the liability of the defendants, either jointly or severally, for interest on uninvested funds, may upon a new trial be more fully developed, and the further consideration of the question at this time is unnecessary.

There does not seem to be any ground for charging the defendant Howard with the sum of \$786 60, received by the defendant Bailey on the exchange of the house and lot for the Kellogg farm. We find no evidence that the defendant Howard had any knowledge of the transaction, or that the money ever came to his hands or under his control. There are some other items charged in the account to which objection is taken. The errors in respect to them, if they exist, are obvious, and can be corrected on a rehearing.

The executors excepted to that part of the judgment which adjudges the determination and extinguishment of the unexecuted trusts, directed by the fifth and sixth articles of the will. By the fifth article, the executors are directed to set apart and invest \$10,000, on bond and mortgage, for the maintenance of the testator's daughter during her minority, and to pay the income to her thereafter, during her life, and in case of her death before the death of his wife, to pay the principal sum to her. By the sixth article, the testator gives to his wife an annuity of \$700, and directs his executors to invest on bond and mortgage, a sum sufficient to produce the annuity, and in case his daughter survives his wife, to pay over the same to her. The executors have never made any investment on the trusts directed by these sections of the will, and prior to the trial of this action, they transferred to the plaintiffs, all the real and personal estate of the testator in their hands. The testator's daughter became of age in 1878, and the plaintiffs, who are the only persons interested, unite in asking that the trusts be extinguished. There are authorities which hold that it is in the power of a court of equity to decree the determination of unexecuted trusts of this nature, where the parties beneficially interested unite in the application. (*Smith v. Harrington*, 4 Allen, 566; *Perry on Trusts*, § 920, and cases cited.) Whatever view may be taken of the general jurisdiction of courts of equity, in the absence

of any statutory or legislative policy to abrogate continuing trusts, created for the purpose of providing a sure support for the widow or children of a testator, or other beneficiary, the indestructibility of such trusts here, by judicial decree, results, we think, from the inalienable character impressed upon them by statute. The beneficiaries of trusts for the receipt of the rents and profits of lands, are prohibited from assigning or disposing of their interest (1 R. S. 729, § 63), and this provision is held to apply, by force of other sections of the statute, to the interest of beneficiaries in similar trusts of personalty. (*Graff v. Bonnett*, 31 N. Y. 9.) This legislative policy cannot, we think, be defeated by the action of the court permitting such alienation, or abrogating the trust. (See *Douglas v. Cruger*, 80 N. Y. 15.) The provision in the judgment in this case, abrogating the trust in question, was therefore unauthorized. Whether any practical difficulty now exist in the way of giving effect to the will of the testator, need not now be considered. It is sufficient to say that the principle, that the courts may destroy trusts for support and maintenance, is sanctioned by the judgment in this case, and the judgment is also for this reason erroneous.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except TRAACY, J., absent.

Judgment reversed.

See *Powers v. Cassidy*, 1 Am. Prob. R. 368; *Evans v. Hardy*, 2 Id. 391.

STATE vs. UELAND.

[30 Minnesota, 277.]

JURISDICTION OF PROBATE COURT TO CONSTRUER WILL AND ELECT
FOR INSANE WIDOW.

The Probate Court has jurisdiction to construe a will when necessary to settle or distribute the estate.

It has, also, jurisdiction to make an election for an insane widow, whether she will take under the will or against it.

PROHIBITION. The relators are the executors of C. C. Washburn, of Wisconsin, who died May 14, 1882, leaving a will which was probated in Hennepin county, this State, on August 28, 1882.

Testator's widow had been insane for twenty-five years, and was deemed incurable. In August, 1882, G. K. Chase, a respondent, was appointed her guardian by the Probate Court of Hennepin county.

Testator's will provided: "I direct my executors to bear constantly in mind the wants of my wife, and to set aside, use and expend whatever moneys may be necessary, consistently with her condition, to provide for her comfort and physical health; and I place no limit upon the sums which they may spend upon the purpose indicated."

The executors filed a bill in Wisconsin against the widow and guardian for instructions, and to determine whether the widow took under or against the will. Pending this suit the guardian filed, in the Hennepin county Probate Court, a written renunciation by the widow of the provisions in the will, signed by the guardian, and a petition asking an adjudication of the sufficiency of the election and for an assignment of her dower interest. The executors sued out a writ of prohibition.

McNair, Gilfillan, Biddle & Bailey, for relators.

C. K. Davis, W. J. Hahn, and Cameron, Losey & Bunn, for respondents.

MITCHELL, J. Section 5, article 6, of the constitution provides that "the district courts shall have original jurisdiction in all civil cases, both in law and equity, where the amount in controversy exceeds one hundred dollars." Section 7 of the same article provides that "a probate court shall have jurisdiction over the estates of deceased persons and persons under guardianship." In determining the extent of the jurisdiction of these courts, as fixed by this division of judicial power, it is necessary not only to read both sections together, but also to consider and construe them in reference to the system of courts and the division of judicial powers existing in Minnesota at the time the constitution was adopted.

In England—formerly, at least—the settlement of the estates of deceased persons was an important branch of the jurisdiction of courts of equity, a large proportion of the suits in chancery being administration suits. As then administered in that country, the jurisdiction of equity courts included nearly everything pertaining to the settlement of decedents' estates, except the probate of wills and the issue of letters testamentary and letters of administration, and, as incident thereto, the enforcement of the payment of legacies of personal property, of which the ecclesiastical courts had jurisdiction. The court of chancery or the chancellor, as the general delegate of the authority of the king as *parens patriæ*, had exclusive jurisdiction over the persons and estates of infants, lunatics, and all persons under guardianship. All guardians were appointed by that court, and it alone had power to commit the person and property of all such persons to the custody of guardians. Persons under guardianship were the wards of that court. But in most of the American States, courts called probate, surrogate, or orphans' courts were established at an early day for the settlement of the estates of decedents, and the determination of all questions arising in the course of administration, to the practical exclusion of equity jurisdiction over such matters. In many of the States jurisdiction was given to these probate courts over the persons and estates of all persons under guardianship, with power to appoint and remove guardians, and to control the persons and estates of the wards. Thus an important

branch of equity jurisdiction, as formerly administered, was transferred to these courts. In some States, theoretically, courts of equity retained concurrent jurisdiction over these matters, although in practice they would not, in the absence of some distinctive equitable principle, assume to exercise it, but leave the matter to the special probate tribunals. In other States, the jurisdiction thus conferred upon the probate courts was held to be exclusive. The latter was the doctrine which prevailed in this territory and in the States from which it borrowed its probate system; and the provisions of the constitution defining the jurisdiction of the district court and probate court must be understood and construed with reference to this State of things then existing. To hold that the equity jurisdiction given by the constitution to the district court extends to everything which pertained to equity jurisdiction as formerly administered in England, would be utterly inconsistent with the grant of jurisdiction to the probate court. Such a construction would limit the judicial power of the latter court over the estates of deceased persons to the mere probate of wills and the issuing of letters testamentary and of administration, and would deprive it entirely of all jurisdiction over the persons or estates of persons under guardianship.

It was clearly the intention of the constitution to give the probate courts the entire and exclusive jurisdiction over the estates of deceased persons and persons under guardianship, in the same manner and to the same extent that it gives to the district court jurisdiction over civil cases in law and equity arising out of other matters of contract or tort. It also seems clear to us that the grant of jurisdiction to the district court in all cases in law and equity must be understood as having reference to equity jurisdiction and equity jurisprudence as then existing and administered, and not to a system which formerly obtained in England, but which had never prevailed in this State. Of course, many suits may arise out of pending administrations and existing guardianships, of which the district courts, and not the probate courts, would have jurisdiction. Suits by an administrator or a guardian against a stranger, to recover the assets of the decedent or the property of the ward, would be

cases of this class. Neither do we mean to decide that there may not be cases where the district court would have concurrent jurisdiction with the probate court, where they involve some additional equitable feature, such as trust or fraud or the like, which of itself, independent of the administration or guardianship, would be sufficient ground for the interference of a court of equity. But no such case is here involved. Hence it is neither necessary nor advisable to define or enumerate these cases, if there be such.

The jurisdiction of the probate courts over the estates of deceased persons includes the power in the first instance to construe a will, whenever such construction is involved in the settlement and distribution of the estate of the testator. Its jurisdiction over the estates of persons under guardianship includes not only the appointment of guardians and the control over their official actions, but the care and protection of the estates of the wards, formerly vested in the court of chancery. Hence, in the proceedings now pending in the Probate Court, that court has the power to construe the will of the decedent, in order to determine whether, under its provisions, it is a case for an election on the part of the widow. And, if it be decided that it is such a case, that court has the right to make the election for the widow, or instruct her guardian to make it under the directions of the court, she being incompetent to make it in person by reason of insanity. Under the former system in England, jurisdiction over this matter of election belonged to the court of chancery, because that court had the care of the persons and estates of persons *non compos mentis*, the underlying principle being that the right was to be exercised by the court which had jurisdiction over the person and estate of the insane person. This jurisdiction being now vested in our Probate Court, this right of election is vested in it.

The case of *Kennedy v. Johnston*, 65 Pa. St. 451, to which we are referred, does not at all conflict with these views. The orphans' court of Pennsylvania is a purely statutory court, clothed with very limited powers. The constitution of that State expressly vests in the Supreme Court and the courts of common pleas "the power of a court of chancery, so far as re-

lates to the care of the persons and estates of those who are *non compotes mentis*."

It follows, in conclusion, that in assuming to act upon the matter now pending before it, the Probate Court is not exceeding its jurisdiction, and therefore the motion to quash the writ of prohibition must be granted.

Writ quashed.

WILLIAMS vs. WILLIAMS.

[55 Wisconsin, 300.]

ADMINISTRATOR'S LIABILITY FOR MONEYS DEPOSITED TO HIS INDIVIDUAL CREDIT ON FAILURE OF THE BANK.

An administrator who deposits estate funds in his individual name in a bank, which fails, must make good the loss, although he had no other funds in the bank, and informed its officers that the money was held in trust.

APPEAL from Rock county Circuit Court by the administrator of Harry C. Williams, from an order disallowing a credit in his accounts for \$665 70, lost by the failure of a bank in which he had deposited that sum.

The court found that the administrator deposited the money in a bank near where he resided, taking a certificate of deposit in his own name for the amount; that the bank was at the time in good credit and repute, as safe, solvent, and in all respects trustworthy; that in making the deposit the administrator informed the teller, who received the money and gave the certificate, that the moneys were trust funds, and did not belong to him individually, but did not inform him to whom the money did in fact belong, nor give any direction as to the deposit being made or the certificate issued in another than his individual name; that said administrator had previously had money on deposit to his individual credit, but at the time in question had none; that the \$665 70 was at the time

in fact placed to his individual credit on the books of the bank, and so remained; that at the time of making the deposit he took the certificate and retained the same; and that in August, 1875, the bank failed, and the amount became wholly lost and the certificate wholly worthless, except as to a small dividend upon the assets in the hands of the receiver.

Bennett & Sale, for appellant.

H. S. Winsor and S. U. Pinney, for respondents.

CASSODAY, J. The very small portion of the argument heard, and a hasty reading of the printed briefs, strongly impressed the writer with the justice and equity of the appellant's theory; but my brethren, who heard all the arguments, are clearly of the opinion that the findings of the Circuit Court are in accordance with the evidence, and that the law applicable thereto rigidly holds the administrator accountable for the amount of the deposit in question. A very careful examination of the authorities induces me to acquiesce in their judgment. Undoubtedly the general rule is that trustees are liable only for good faith and common prudence, and that if a loss happens to a trust fund, in relation to which they have exhibited this care and prudence, they may be allowed for the loss in their accounts. This is abundantly shown by the authorities cited by the able counsel for the appellant. But here the trust fund was not left with the bank for safe keeping, and to be preserved in kind as a special deposit, but as a deposit to the credit of the depositor, and the amount of which was "payable to the order" of the depositor "in currency on the return of" the "certificate properly indorsed." Thus it is plain that the identical money deposited was not to be returned, but the amount of it was to be paid "in currency" on presentation of the certificate properly indorsed. In other words, the depositor parted with the money for the general use of the bank, and took from the latter its obligation to repay a like amount in currency when required as stated. The authorities seem to hold, and it would probably be conceded, that the *cestui que trust* of this fund could have held the bank

liable as against the personal representatives, creditors or legatees of the depositor. But the question here is, whether the depositor is released from liability to his *cestui que trust* by reason of such deposit and the subsequent failure of the bank?

The earliest case cited is *Knight v. Lord Plimouth*, 3 Atkyns, 480; s. c. 1 Dickens, 120, decided by Lord Chancellor Hardwicke in 1747, where it was held that "where a receiver pays money to a tradesman, and takes bills for the sum, if he was in credit at the time, though he fails soon after, it shall not affect the receiver." It does not appear from the report of that case whether the deposit was made by the receiver *as receiver* or as an individual.

In *Wren v. Kirton*, 11 Ves. Jr. 377, Lord Chancellor Eldon said: "In *Knight v. Lord Plimouth*, I apprehend, the deposit with the country banker was to the account of the receiver *as receiver*; not to his individual account." And subsequently, in the same case, he said: "I should not much fear to contradict that case of *Knight v. Lord Plimouth*, upon what has been done by later authorities, if it is as represented; for nothing is more dangerous. * * * If he goes to a responsible banker, and gets a bill upon a responsible house in London, in his favor *as receiver*, that bill, so ear-marked, would be specific assets to the credit of the trust property." And so, in the case last cited, he held the "receiver charged with a loss by the failure of the banker; having made the remittances to his own credit and use, and not to a separate account for the trust." The same rule was followed by Lord Chancellor Brougham in *Salway v. Salway*, 2 Russell & Mylne, 215, subsequently affirmed by the House of Lords, *Id.* 751. (See *White v. Baugh*, 3 C. & F. 44.) It is true that *Knight v. Lord Plimouth* has frequently been referred to in other cases without such discrimination (*Rowth v. Howell*, 3 Ves. Jr. 566; *Lovell v. Minot*, 20 Pick. 119; *U. S. v. Thomas*, 15 Wall. 343; *Seawell v. Greenway*, 22 Texas, 697); but the distinction thus made by Lords Eldon and Brougham seem to be well supported by authority. (See *Massey v. Banner*, 4 Madd. 413; *Tebbs v. Carpenter*, 1 Madd. 290; *Matthews v. Brise*, 6 Beav. 239.)

In holding the trustee liable in the last case cited, the learned Master of the Rolls lays stress on the fact that the exchequer bills "remained undistinguished" as trust property in the hands of the broker, and indicates that if he would have escaped liability he should have distinguished them as such trust property. To the same effect is *Massey v. Banner*, 1 Jacob & W. 248, where Lord Eldon said: "If an assignee pays money into the banker's hands as money belonging to the estate, and the banker fails, the assignee is undoubtedly clear from the loss; but if, instead of distinguishing it, he pays it all into his own account, then it is his account there; there is nothing like a declaration of trust of it, and it is familiar to consider him as having it in the banker's hands for himself, making him liable for it, etc. * * * I cannot doubt that this principle has been acted on with trustees and executors, who are equally gratuitous agents with this defendant."

In *Robinson v. Ward*, 2 Car. & Payne, 60, Abbott, C. J. (Lord Tenterden), speaking of the method by which the agent might have escaped liability, said: "The defendant should have paid this money into a banker's hands by opening a new account in his own name, 'for the credit of Robinson's estate,' and so ear-mark the money as belonging to that estate; then it would have been kept separate." (See also *Macdonnell v. Harding*, 7 Simon, 178; *Hammon v. Cottle*, 6 Serg. & R. 290; *Cartmell v. Allard*, 7 Bush, 482; *Bartlett v. Hamilton*, 46 Me. 435.)

In *Norris v. Hero*, 22 La. Ann. 605, it was held that "an agent who, when it becomes his duty to deposit in bank the moneys of his principal, fails to make the deposit in the name of his principal, becomes personally liable for the amount. In such a case the agent will not be permitted to urge the failure of the bank after the deposit was made, and throw the loss on the principal." To the same effect is *Mason v. Whitthorne*, 2 Coldwell (Tenn.), 242. The rule would seem to be imperative, that where "an administrator or trustee deposits trust funds in his own name in a bank or other institution, which fails, the loss will fall upon him." (*Commonwealth v. McAlister*, 28 Pa. St. 480; s. o., 30 Pa. St. 536.) In the opinion of the court in the last case, Porter, J., said:

"If he [the trustee] undertakes to make a deposit in a banking institution, the entry must go down on the books of the institution, in such terms as not to be misunderstood, that they are the funds of the specific trusts to which they belong. He cannot so enter them as to call them his own to-day, if they are good, and to-morrow, if bad, ascribe them to the estate, or shift them in an emergency from one estate to another; or, by the deposit, secure the discount of his own note, and have the deposit snatched at by the bank if the note be not paid, or attached by a creditor as the depositor's individual property. * * * No matter what he intends to do, or what the cashier or clerk may think he is doing, the deposit must wear the impress of the trust, or he cannot, when brought to account, call it trust property." (See *Baskin v. Baskin*, 4 Lansing, 90.)

Following in the line of the English cases, in *Jenkins v. Walter*, 8 Gill & J. 218, "where a guardian had received a sum of money belonging to his ward, and on the day of its receipt had deposited it in a banking institution then in good credit, but which subsequently failed, and taken a certificate therefore payable to himself or order, it was held that the loss resulting from the failure of the bank should fall upon him, though on the day of the deposit, by indorsement on the certificate, he declared it to be the property of his ward, and placed in bank for his benefit. So Mr. Perry, on the strength of some of the English cases cited, says: "If money is to be transmitted to a distant place, a trustee may do so through the medium of a responsible bank, or he may take bills from persons of undoubted credit, payable at the place where the money is to be sent; but the bills must be taken to him *as trustee*. If he neglects these precautions he will be responsible for any loss." (Section 406.)

It is true that in some of the cases cited the trustee had at the time of making the deposit a credit to his individual account at the bank, and such deposit was credited to him individually in the same account. But the test is not so much the keeping of a separate account at the bank, as it is the parting with, and hence the losing of the identity of, the trust fund,

and having in lieu thereof no obligation, contract or account upon which is impressed the equitable ownership of the trust. Had this administrator retained these moneys in his own possession, and mingled them with his own funds so as to lose their identity, and the whole had been lost without his fault, yet we apprehend he would have been liable. (*Shoemaker v. Hinze*, 53 Wis. 116.) Here the fact that he delivered the moneys to the bank, and thus allowed them to be mingled with other funds, destroyed their identity as completely as though he had first mingled them with an equal amount of his own moneys, and then deposited the whole in bulk. The deposit, therefore, put an end to the identity of the funds deposited, and the certificate was simply an agreement, taken in exchange for the money, to repay a like amount in currency upon the conditions named. Beyond question the certificate was negotiable. (*Klauber v. Biggerstaff*, 47 Wis. 551.) To all appearances it was the individual property of the depositor, and not of the estate which he represented, and there was nothing on the books of the bank to indicate the contrary. It stood, therefore, precisely the same as though he had loaned the money to an individual at the time supposed to be responsible, and taken his negotiable note therefor without interest, payable on demand "in currency" to the order of himself. The making of the deposit and taking the certificate to himself individually was therefore not only an extinguishment of the identity of the money, but an appropriation of it, in law, to his own personal use. This being so, shall the rule be established by this court that administrators, executors, trustees and guardians may insist upon settling their accounts by tendering such notes or certificates in lieu of cash, however worthless may be the makers or the bank at the time of settlement? The question is important, and the answer vast in its consequences. To hold the administrator answerable in his case is undoubtedly a great hardship; but to exonerate him from liability is to encourage the mismanagement of trust funds, and to open the door to frauds innumerable against those whose age and weakness entitle them to the most rigid protection of the law.

The rule, therefore, should not be slackened, even if the question were a new one, much less in view of the authorities cited.

It may be said that the remarks of Mr. Justice Paine in *School District v. Zink*, 25 Wis. 636, to the effect that the mere substitution of a certificate of deposit payable to the holder of a check on a bank for the check itself, worked no change whatever in the *status* or title to the fund in bank, are inconsistent with the view we have taken of this case; but in so far as that opinion is in conflict with this decision, it must be regarded as overruled.

For the reasons given, the judgment of the Circuit Court must be affirmed.

Judgment affirmed.

See *McCabe v. Fowler*, 2 Am. Prob. R. 126.

RICE vs. RICE.

[50 Michigan, 448.]

EFFECT OF ORDER ADJUDGING TESTATOR INCOMPETENT TO MANAGE PROPERTY.—OPINIONS OF NON-PROFESSIONAL WITNESSES.—DELUSIONS.

An order made a few hours after the execution of a will, adjudging testator unfit to manage his property and appointing a guardian for him, is only admissible as part of decedent's history contemporaneous with the testamentary act, and not as raising a presumption of insanity or lack of capacity.

Opinions of non-professional witnesses who speak from observation as to testator's capacity, are admissible, but they must describe what has led to their conclusions as well as their means of observations.

Delusions as to "greenbacks," maltreatment by his wife, and other topics not influencing the provisions of the will, cannot be proved.

APPEAL by proponent for probate of a will.

Hawes & Shakespeare, for appellants.

O. W. Powers and *H. C. Briggs*, for appellees.

COOLEY, J. The writ of error in this case brings before us the proceedings on the probate of the will of William H. Rice, late of the county of Kalamazoo, who died December 3, 1880. Plaintiff in error is his widow and was named sole executrix in the will. Defendants are his heirs at law. The will was admitted to probate in the Probate Court, but denied it in the Circuit Court. Two objections were made to it in the pleadings: *First*, that Rice was insane when he executed it; and *second*, it was obtained from him by undue influence. This second objection was abandoned on the trial.

A copy of the will is given in a note [*post*, p. 134], and its provisions are seen to be simple and not obviously unreasonable. The evidence disclosed the fact, however, that on the day of its execution proceedings were pending in the Probate Court for the appointment of a guardian for Rice, and the appointment was actually ordered a few hours after the will had been signed and attested. As these proceedings were made important and perhaps controlling by the rulings of the circuit judge, it is necessary to understand exactly what they were.

The petition for the appointment of a guardian was made by two of the children of Rice, and by a third person, whose relations to him are not stated. The petition states that Rice is possessed of real and personal estate, estimated at \$21,500, and that he is, as petitioners believe, "mentally incompetent to have the charge and management of his property," and that, as they are informed and believe, he "is expending and has expended money within the past few days foolishly and unnecessarily, and for articles and property which he did not need, and paid and agreed to pay more than the same was worth." Rice was notified to answer, and appear and procure an adjournment, but on the adjourned day, instead of contesting the application, went to the office of Mr. Shakespeare, an attorney, and had his will prepared and executed, and then went home. The petitioners appeared before the probate judge, and the order appointing a guardian was made, the judge reciting therein that it appeared to him that Rice was "insane and incompetent to have the care of his property." Rice was at this

time sixty-eight years of age, and had been married to the plaintiff about three years and six months.

The defendants in this case contended that the order appointing a guardian was *prima facie* evidence of the incapacity of Rice to make a will, and that the plaintiff must overthrow this *prima facie* case by affirmative evidence. The circuit judge assented to this view, and instructed the jury as follows: "This determination of the Probate Court is on the first view, or *prima facie*, evidence of the testator's insanity and incapacity to make a will, and shifts the burden of proof to the proponents, and renders it necessary for them to establish before you by a preponderance of the evidence that the deceased was mentally competent to make a will at the time of the execution of the instrument here proposed for probate."

If the question of testamentary capacity had been involved in the application for the appointment of a guardian, and had been determined by the appointment, the circuit judge would have been correct in his ruling. But in fact it was in no way involved. The substantial averment in the petition was that Rice was mentally incompetent to have the charge and management of his property, and was wasting it. Insanity was not alleged or put in issue, and the recital of the existence of insanity in the order which was made was very likely an inadvertence. But, whether inadvertent or intentional, it went beyond anything to which Rice had been called upon to answer, and was of no force. The order judicially determined that Rice had become unfit to manage his property, and it determined nothing more. But this is not inconsistent with testamentary capacity; the state of being unfit to manage property is not even inconsistent with capacity to make contracts; and the principal reason for the appointment of a guardian often is that a party possessing the capacity and power to contract is employing it foolishly. But if a party has capacity to make a contract, and to bargain in respect to its terms with another who may be supposed to have an interest in getting the better of him, he must certainly have authority to execute, as his own voluntary and spontaneous act, a testamentary disposition of

his property. Testamentary capacity is not, therefore, disproved by the determination that cause exists for guardianship.

It follows that the circuit judge erred in his rulings respecting this appointment. It was competent to prove it, as a part of the decedent's history contemporaneous with the alleged testamentary act, and as throwing light upon his actions and conduct about that time; but as an adjudication it was without important bearing.

A number of witnesses who had known the decedent in his lifetime, and had seen more or less of him at about the time the will was executed, but who were not medical experts, were allowed to testify that in their opinions he was then insane. Some of them expressed opinions in connection with a statement of facts upon which the opinions were based, and some apparently did not. These opinions were objected to, but were received upon the supposed authority of decisions by this court. The cases relied upon were evidently misunderstood. In *Beaubien v. Cicotte*, 12 Mich. 459, 501, opinions by non-professional witnesses were held to be admissible, when they could speak from personal observation, but it was said that "in every case the witnesses who speak from their own observation are expected to describe, as well as they can, what has led to their conclusions, as well as their means of observation." In *Kempsey v. McGinniss*, 21 Mich. 123, 138, a similar statement is made: "In the case of such professional witnesses, as well as in that of unprofessional witnesses,—who are allowed to give their opinions only from personal observation,—the facts upon which the opinion is founded must be stated, and the jury must be left to determine whether the facts stated, as well as the opinions based upon them, are true or false." The principle of these cases is that the witnesses must explain to the jury the grounds for their opinions so far as the circumstances will admit; and we are constrained to say that in some instances this was not done on this trial, and that opinions were received, of the reasonableness of which the jury were given, by the facts stated, no means of judging.

This error may have had an important influence in the case, for it is very evident that some of the witnesses had no

just conception of what was meant by insanity or by testamentary capacity. And some of the questions had a plain tendency to mislead them in this regard. Thus, this question was put to one witness: "Well, supposing him to have had a valuable farm of 160 acres of land, and some hundreds of acres of swamp land, and some real estate in the village, and some personal farm property, and also to have had a wife and children and grandchildren, what would you say in your opinion as to his ability to plan and execute a will, judging from what you related to the jury as to his appearance and conversation, and what you knew of him formerly?" Here the suggestion to the witness by the question is of something complicated and difficult, requiring a recollection and comprehension of the several items of a considerable estate, and the several members of a considerable family, and he is invited to compare the man as he then was with the man as he had formerly known him. If, under such circumstances, the witness is impressed that there has been a great weakening of mental powers, as it seems probable was the case here, it will not be surprising if he expresses an opinion unfavorable to mental capacity for the supposed act. But no act can well be more simple than the gift of his property by an old man to the members of his immediate family; and it ought not to be considered, by court, or witness, or juror, to be an act requiring strong mind or considerable capacity. The power to make such a gift becomes an important protection in that period of life when incapacity to labor and to conduct profitable enterprises has arrived, and it is important to see that it be not taken away by erroneous notions as to what is required for testamentary capacity. It is very evident, we think, that some of the witnesses in this case expressed opinions to the jury which had been formed by standards altogether incorrect and misleading; and the opinions themselves were consequently worthless.

Much of the evidence in the case, which was put in to prove insanity, had a tendency to show delusions on certain subjects. The decedent, it is said, talked foolishly about "greenbacks;" he imagined himself a high federal officer, and he solicited votes for an office when no election was pending. But we look in

vain in the will, whose provisions were dictated by himself, for any trace of these delusions, or any evidence that it was in any way influenced by them. Conceding the delusions, therefore, does not dispose of the will, or necessarily determine that it should be set aside. (*Fraser v. Jennison*, 42 Mich. 206.) The most remarkable evidence on this branch of the case is of statements made by decedent that his wife made the advances in courtship, and that on one or more occasions she inflicted outrageous personal injury on him after marriage. No attempt was made to show that the decedent was really under delusion in respect to these matters, and the natural tendency of the evidence was to prejudice the jury against the plaintiff by leading them to believe or to suspect that she was an unworthy person and undeserving of her husband's bounty. But the existence of a delusion that his wife was unworthy of esteem, or was abusing him, would be a singular reason for setting aside a gift which he had deliberately made in her favor.

Such errors as occurred in the instructions are sufficiently indicated by what has been already said. After the full examination of the general subject of testamentary capacity in the case of *Pierce v. Pierce*, 38 Mich. 412, and *Fraser v. Jennison*, 42 Mich. 206, we do not deem it necessary to enlarge upon it here. But we repeat what we have said in substance in those cases, that a will is not to be set aside merely because the party making it was weak, or sometimes foolish, or lacked the average mental capacity of his neighbors, or did not dispose of what was his own as others who could know nothing of his reasons might think he ought to have done, nor necessarily because he was subject to delusions, when it is manifest that the delusions did not affect his gifts.

The case must go back for a new trial, and the plaintiff in error must recover the costs of this court.

We are compelled to say, however, that the record which has been brought to this court is inexcusably voluminous. The bill of exceptions is apparently made by simply attaching a hearing and a conclusion to the stenographer's notes, and it was at least three times as large as was necessary for presenting the alleged errors. This method of preparing a bill of exceptions may be labor-

saving to counsel, but it is oppressive in its expense to the parties and it imposes unnecessary labor in dealing with the case in this court. In taxing the costs, therefore, the plaintiff will be allowed for one-third the expense of the record, and no more.

The other justices concurred.

See Will of Cole, 1 Am. Prob. R. 339; Estate of Johnson, 2 Id. 524.

Will of William H. Rice.—In the name of God, amen, I, William H. Rice, of the township of Comstock, in the county of Kalamazoo and State of Michigan, of the age of sixty-eight years, and being of sound mind and memory, do make, publish, and declare this my last will and testament, in manner following; that is to say:

First. I give and bequeath to my wife, Nellie M. Rice, the sum of two thousand dollars; also my house and lot in the village of Kalamazoo, on Dutton street, number forty-three.

Second. I give and bequeath to my son, Parley H. Rice, the north one hundred acres of what is known as my swamp land in the township of Comstock, Kalamazoo county, Michigan, this being in addition to the sum of six thousand dollars, including interest, that I have already advanced the said Parley H. Rice.

Third. I give and bequeath to my son, Noah Rice, the west one hundred and ten acres of my present homestead.

Fourth. I give and bequeath to my two grandsons, children of my deceased son Henry, the east forty acres off the east end of my present homestead; also the one hundred and twenty acres of land on the swamp, just south of the land bequeathed to my son Parley.

Fifth. I give and bequeath to John Dunlap, son of my second wife, forty acres of land on section twenty (20), just south of land owned by W. F. Stillwell, in the township of Comstock.

Sixth. I desire it to be distinctly understood that the bequest to my wife is in addition to any and all rights of dower she may be entitled to in my estate.

And lastly. I give and bequeath all the rest and residue and remainder my personal and real estate to my two sons before mentioned, and the heirs of my son Henry now deceased, in equal shares, and I hereby appoint my wife, Nellie M. Rice, sole executrix of this my last will and testament, hereby revoking all former wills by me made.

In witness hereof, I have set my hand and seal this seventh day of November, A. D. 1879.

WM. H. RICE.

WILL OF O'NEIL.

[91 New York, 516.]

WHAT IS A "SUBSCRIPTION AT THE END OF THE WILL."

Where testator made his will on a blank with a printed commencement and termination, and, filling the intervening space, wrote part of a material provision above the printed ending where he put his signature, and the remainder at the top of the succeeding page, there is no subscription "at the end of the will" as required by statute.

APPEAL from a judgment of the general term of the Supreme Court in the third department, reversing a decree of the surrogate of Essex county admitting to probate an instrument purporting to be the will of James O'Neil, deceased.

The testator used a blank. The printed commencement was on the first page and following it were written provisions until the thirteenth was reached. When the will read:

"13th. And I authorize and empower my executors, hereinafter named, to sell, convey, assign and transfer my real property for the payment of the bequests hereinbefore named and mentioned either at private ——"

The printed termination then came, such parts as were written being designated by italics:

"Likewise I make, constitute and appoint *Dennis Daley, of the town of Moriah, Essex county, State of New York, George T. Treadway, also, Edward Donohoe, all of Moriah,* to be executors of this my last will and testament, hereby revoking all former wills by me made.

"In witness whereof, I have hereunto subscribed my name and affixed my seal the 23th day of *February*, in the year of our Lord one thousand eight hundred and *eighty*.

[L. s.]

"JAMES O'NEIL.

"The above instrument, consisting of one sheet, was at the date thereof subscribed by *James O'Neil* in the presence of us and each of us, he at the time of making such subscription acknowledged that he made the same and declared the said

instrument so subscribed by him to be his last will and testament; whereupon we then and there at his request and in his presence and the presence of each other subscribed our names as witnesses thereto.

"Dennis Daley, residing at Mineville, N. Y.

"George T. Treadway, residing at Mineville, N. Y.

"Edward Donohoe, Mineville, N. Y."

On the fourth page was written :

"Or public sale and in the manner which they will deem the most profitable and advantageous to my said estate, but in no case shall my said executors be process by law or otherwise to sell and convey and dispose of my said real property before the lapse of five years after my death unless my said executors shall see fit and proper to sell and dispose of the same by virtue of the power and authority hereinbefore given them as aforesaid."

Matthew Hale, for appellants.

Samuel Hand, for respondents.

RUGER, Ch. J. The matter in controversy arises between some of the heirs at law and the executors, over the alleged improper execution of what purports to be the will of James O'Neil.

The instrument was drawn upon a printed blank, consisting of four pages, the formal commencement being printed on the first page and the formal termination, also printed, appearing at the foot of the third page, and the intermediate space being originally left blank for the insertion of such special provisions as the testator might desire to make. When presented for probate the entire blank space was filled in, and it being apparently insufficient in extent to contain all of the provisions sought to be introduced into the will, the thirteenth seems to have been carried over and finished on the first eight or ten lines of the fourth page. That portion of the will

seems in no way to be authenticated, and leaves a blank space of two-thirds of a page below the written lines. The names of the testator and of the witnesses were subscribed toward the bottom of the third page, below the formal printed termination of the will, and there only. The portion of the thirteenth paragraph, immediately preceding the printed termination, was manifestly incomplete, and the lines written on the fourth page were obviously a continuation of this broken paragraph. The two portions were not, however, sought to be connected by means of a reference, asterisk, words, or symbol, indicating the relation to each other. Material provisions are contained in the writing upon the fourth page. Upon this state of facts the question is raised that this is not such a subscription and signing by the testator and the witnesses at the "end of the will," as is required by our statute. (2 R. S. 63, § 10.) The application of some of the elementary principles governing the interpretation of statutes would seem to furnish a safe and certain guide for the determination of the question presented. The words of the statute must be construed in their plain, obvious sense, according to their signification among the people to whom they were directed. (*Ogden v. Saunders*, 12 Wheat. 332; Story on Const. § 449.) Also that construction must be adopted which will effectuate, as far as possible, the intent of the framers of the statute, and obviate the anticipated evils which were the occasion thereof. (*Tonnele v. Hall*, 4 N. Y. 140.) The legislative intent was doubtless to guard against frauds and uncertainty in the testamentary disposition of property, by prescribing fixed and certain rules by which to determine the validity of all instruments purporting to be wills of deceased persons. (Reviser's Notes; *Willis v. Lowe*, 5 Notes of Cases, 428.) The question then arises whether the "end of the will" referred to in the statute means the actual physical termination of the instrument, or that portion thereof which the testator intended to be the end of the will. While it is possible that in isolated cases, the latter construction might sometimes preclude the perpetration of a wrong—it certainly would not satisfy the general object of the statute of furnishing a certain fixed and definite rule applicable to all cases.

While the primary rule governing the interpretation of wills, when admitted to probate, recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating their execution. In the latter case courts do not consider the intention of the testator, but that of the legislature.

In considering the question stated upon authority, some cases are found which apparently sustain the contention of appellant's counsel. In all of them, however, there was a failure to observe the rules of construction which we consider controlling. We think, however, that the weight of authority favors the theory, that the statute fixes an inflexible rule by which to determine the proper execution of all testamentary instruments.

The cases cited from the English Reports, except certain ones hereinafter referred to, do not afford much assistance in construing our statute, from the fact that they cover a period during which material changes were wrought in their statutes, and the further fact that those statutes differ in material respects from our own. The statute of 15 and 16 Victoria, chap. 24, among other things, provided that no signature "shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made." From this alone might be deduced arguments sufficient to dispose of the question involved in this case if our statutes contained similar provisions.

As early as 1847, Sir Jenner Fust, in the case of *Willis v. Lowe* (*supra*), says: "Cases have occurred, before the real purpose of the act had been ascertained, in which the court has given construction to the statute as far as possible to fulfill the real intention of the parties; but the court is under the necessity of looking at the clear intention of the act. The court was of the opinion, at first, that the intention of this part of the act was to remove the difficulty which had arisen under the statute of frauds, by the construction of which, a signature at the commencement of the will was equally good with the signature at its end. But there was another reason for the

provision, viz.: to guard against fraud. The act required the signature to be at the foot or end of the will, to prevent any addition to the will being made after its execution in presence of witnesses." In *Dallow's Case* (L. R., 1 P. & D. 189), immediately following the signatures of the testator and the witnesses, was the clause "my executors are" A., B. and C. The will contained clauses in the body referring to his executors as "hereinafter named," but they were named in no other place except after the signature. It was held that the clause naming the executors could not be admitted to probate, Sir J. B. Wilde saying, "The question is whether, under St. Leonard's act (15 and 16 Victoria), the clause appointing executors can be admitted to probate. Although parol evidence may show that the clause appointing executors was written before the signature, it is not made manifest by any words in the will of the testator so describing that clause when he referred 'to my executors hereinafter named.' And parol evidence cannot be received for that purpose, and it seems to me, also, that it would be directly contrary to the statute, which requires the will to be signed at the foot or end, to permit probate in this will."

In *Sweetland v. Sweetland* (4 Swaby & Tristram, 6), Sir J. B. Wilde says: "I have no doubt the testator did intend to execute, in proper form, the will; the question is whether he has done so."

In *Hays v. Harden* (6 Penn. St. 409), Gibson J., says: "Signing at the end of the will was required to prevent evasion of its provisions."

In *Glancy v. Glancy* (17 Ohio St., 134), Day, Ch. J., says: "The testator is required, by this portion of the statute, to sign his will at the end thereof. The reason of this requisition is obviously to prevent improper alterations of a will." "The provision is a judicious one, and care should be taken not to break in upon it by a lax interpretation."

We think this question has been substantially determined in this court, in the case of *The Sisters of Charity v. Kelly* (67 N. Y. 409). Folger, J., says: "Can we say that the end of the will has been found until the last word of all the provisions of it have been reached? To say that where the

name is, there is the end of the will, is not to observe the statute. That requires that where the end of the will is there shall be the name. It is to make a new law to say that where we find the name there is the end of the will." "The statutory provision requiring the subscription of the name to be at the end is a wholesome one, and was adopted to remedy real or threatened evils. It should not be frittered away by exceptions."

It will be seen, in all of the cases cited, there was no reason to doubt the testator's intention to make a valid disposition of his property, and yet in each case the will was denied probate, because in the execution thereof the testator did not conform to the provisions of the statute, in failing to place his signature at the physical end of the will.

It is claimed by the counsel for appellant that the clause in question may be regarded as an interlineation and thus held to be constructively a part of the body of the will. We think that this claim cannot be supported without opening the door to all of the evils which the statute was intended to prevent, and substantially abrogating its wholesome provisions.

The same argument would validate the addition of a fourteenth paragraph to the unauthenticated lines appearing on the fourth page and lead, by logical deduction, to indefinite extension. It is said also, that the cases holding that a paper or document referred to in the body of a will may be considered as a part thereof, afford support to the construction claimed by appellant's counsel.

It is not believed that any paper or document containing testamentary provisions, not authenticated according to the provisions of our statute of wills, has yet been held to be a part of a valid testamentary disposition of property, simply because it was referred to in the body of the will. It was held in *Tonelle v. Hall* (4 N. Y. 140), that a map appearing after the signature upon a will, and said to be a reduced copy of a map made by the testator of his real estate and filed in the county clerk's office of New York, and which was referred to in the body of the will, did not require the signature of the testator and witnesses to follow it in order to make it a part of the

will. It is to be observed that the paper there in question was referred to merely to identify the subject devised, and contained no testamentary provisions. It is further to be observed that the will in the case cited was complete without such additions, and that the maps could probably have been used as evidence to identify the property devised, even if no reference had been made thereto in the will. Independent of authority the argument upon principle leads inevitably to the conclusion that the will was improperly executed. The signatures to it are confessedly between the various operative and disposing parts of the instrument, and in no sense at the literal or physical end of the will. That the signatures are where the testator intended the will should end we have already seen is not a material circumstance. A blank space, covering two-thirds of a page of foolscap paper, is left immediately after the language we are invited to insert in this will, and no possible guard is provided against the addition thereto of any such provision as the person in possession of this paper may be tempted to make. There can be no answer to the proposition that to uphold this will is to defeat the object of the statute in requiring a will to be subscribed at the end. The opportunity of adding indefinitely to a testamentary provision will be legalized by so holding, and the statute, instead of establishing an inflexible rule by which to determine the proper execution of a will, will be open to as many different constructions as varying circumstances may invite. We thus arrive at the conclusion that the will in question was not properly executed, and it cannot, therefore, be admitted to probate. The claim that such parts of the will as precede the signatures may be received and the remainder rejected cannot be supported. The statute denies probate to a will not executed in accordance with its provisions. It is either valid or invalid as an entirety as far as its execution is concerned. It is undeniable that the portion following the testator's signature contains material provisions and formed part of his scheme in making a will. At all events we have no way of determining the extent to which he deemed them material, and cannot give effect to one part and deny force to another. This

point was decided adversely to the appellant in *The Sisters of Charity v. Kelly*, and other cases above cited.

The judgment should be affirmed.

All concur, except RAPALLO, J., not voting.

Judgment affirmed.

Location of testator's signature.—At common law no signature was required by the testator to his will, nor was any required by the statute of wills. 34 Hen. VIII, c. 5. The statute of 29 Car. II, c. 3, § 5, being the statute of frauds, requires that wills be signed, but under this statute the position of the signature was immaterial. This statute was drawn and proposed as a law, in the House of Lords, by Lord Chancellor Nottingham, who had learned, in chancery, the importance of a signature to such an instrument. 8 Swanst. 364.

The statute of wills (1 Vict. c. 26), for the first time in the English statutes, directs as to the position of the signature. It enacts that every valid will "shall be signed at the foot or end thereof, by the testator, or some other person in his presence, and by his direction." The statute, 15 and 16 Vict. c. 24, § 1, defines and enlarges the foregoing statute, to the effect that the signature must be "at, or after, or following, or under, or besides, or opposite, to the end of the will."

Upon these two statutes of Victoria, with occasional deference to the older legislation, and subject to certain, in the main, immaterial local variations, the statute of wills, now in force in every State in the Union, have been based. The local statute should be consulted in each case.

The statutes of Kentucky, California, and Connecticut, requires the will to be "subscribed." The statutes of the other States contain the word "signed." In New York, Ohio, Pennsylvania, Arkansas, Nebraska, and Kansas, it is required that the signature be at the end of the will.

In *Cohen's Will*, 1 Tuck. 286, the signature of the testator, at the end of the attestation clause, along with the witnesses, was held sufficient.

In Pennsylvania a will must be signed by the testator, unless, being *in articulo mortis*, he is rendered unable to sign by the extremity of his last sickness; but a clause added by the testator, after his signature, assigning his reasons for making the will, invalidates the whole will. *Hays v. Harden*, 6 Penn. St. 409.

Where a will was folded up and indorsed by the testator, "R.'s will," not being signed inside, it was held, in Virginia, insufficient. *Roy v. Roy*, 16 Gratt. 418.

It must appear from the will itself, that the signature was intended for a signature, in order to give the will authenticity. *Waller v. Waller*, 1 Gratt. 454.

In Alabama it seems that a signature at the beginning of a will is sufficient. *Armstrong v. Armstrong*, 29 Ala. 538.

Even though the will be written for the testator by another person.

In Kentucky, it seems that where the name of the testator is written in the body of the will, with the design of giving it authenticity thereby, the subscription of the name at the end is not necessary, it appearing that there was no intention on the part of the testator so to sign. *Sarah Miles' Will*, 4 Dana, 1 (*Robertson, J.*); *Allen v. Everett*, 12 B. Mon. 378.

Where a will is written on several sheets of paper fastened together by string, proof by two witnesses that the testator's signature was at the end thereof, is sufficient. *Giuder v. Farnum*, 10 Penn. St. 98.

See also a leading case in New York. *Tonnele v. Hall*, 4 Comst. 140.

An English case in point is *Sweetland v. Sweetland*, 4 Sw. & Tr. 9.

Where a will was written on every other page, on one side only of each sheet, and the witnesses signed at the top of a page, leaving the preceding page blank for conformity, it was held a sufficient signing. *Gilman v. Gilman*, 1 Redf. 354.

But the witnesses, no less than the testator, must sign at the end. *Soward v. Soward*, 1 Duv. (Ky.) 132; *Coffin v. Coffin*, 23 N. Y. 9; *Peck v. Cary*, 27 N. Y. 9; *Butler v. Benson*, 1 Barb. (N. Y.) 526; *Jackson v. Van Dusen*, 5 Johns. 144; *Adams v. Chaplin*, 1 Hill's (S. C.) Ch. 265. *Contra*: *Murray v. Murphy*, 39 Miss. 214.

Where something follows the signature of the testator, it seems that, in England, the rule laid down in *Hays v. Harden* (cited above), does not always apply. In *re Woods*, L. R. 1 P. & D. 556; In *re Burt*, L. R. 2 P. & D. 214; In *re Arthur*, L. R. 2 P. & D. 273.

See also a case in point. *Lewis v. Lewis*, 13 Barb. (N. Y.) 17; and the opinion of Chancellor Walworth, in *Watts v. Public Adm'r*, 4 Wend. 168, and 1 Paige, 347.

BENNETT vs. RHODES.

[58 Maryland, 78.]

RESPONSIBILITY OF LEGATEES CARRYING ON TESTATOR'S BUSINESS.

Legatees carrying on testator's business, according to a "desire" expressed in his will, by which the profits were given them, and it was directed that his moneys invested in the business at his decease should remain there for three years, without interest, must make good to the estate at the expiration of that time the amount of testator's capital, irrespective of its loss by the vicissitudes of business.

APPEAL from the Circuit Court of Baltimore city.

Thomas Hughes and *William A. Fisher*, for Rhodes and others.

John P. Poe and *Arthur W. Machen*, for Bennett and Reese.

MILLER, J. The main question presented by the record in this case, is the construction of the codicil to the will of Charles Hoffman, who died in August, 1875. By his will, executed in June, 1873, the testator, after giving his wife, Anna Hoffman, a life-estate in all his property, real and personal, made sundry devises and bequests to take effect upon her death, to various parties, including Alfred Bennett and George D. Reese. He then gave the residue of his estate to Bennett, and five of the other parties to whom he had previously made special devises and bequests, and appointed Bennett and his wife his executors. By the codicil executed in August, 1874, he first ratifies and confirms every clause, bequest and devise contained in his will, and then makes the following addition thereto :

"My will and desire is, that in the event of my death, and my wife should be living at that time, that the business which I have been and still am engaged in (and have been conducting for near fifty years), shall be continued by my nephew, Alfred Bennett, for three years, unless my wife, or my nephew, Alfred Bennett, should depart this life before such said time shall have expired ; either event taking place, the said business to be wound up, and my estate settled according to my will."

"Further, it is my will and desire that Mr. George D. Reese be associated with my nephew, Alfred Bennett, in conducting said business, he to receive one-half of the net proceeds, and my nephew, Alfred Bennett, the other half."

"I also will and desire that what money I may have invested in the business, at the time of my death, shall remain in their business, for their use, without interest, for three years, unless said business should be sooner determined, either by the death of my wife or nephew, Alfred Bennett ; either event

happening, the business to be wound up, and my capital returned to my estate, and settled according to my will."

"It is also my desire that the said Bennett and Reese shall occupy my warehouse, during the period hereinbefore referred to, at an annual rent of \$500, to be paid in quarter-yearly instalments of \$125."

Bennett and Reese carried on the business for three years, and during that time lost the capital, as they allege, by the vicissitudes of trade, without fault, bad faith or negligence on their part. They now insist that by the true construction of the codicil they are not bound to refund the capital thus left in the business by the testator, because it was not left with, or received by them, as a *loan* for which they were to be absolutely responsible, but was accepted by them solely as a *trust* created by the testator, which they executed with entire good faith, skill and diligence, and consequently, as the capital, when the business was wound up, was found to have been honestly and fairly lost, no obligation rested upon them to return it. But we are unable to place upon this instrument a construction which would thus relieve these parties from liability. It is doubtless true, that if a testator directs his *executors* to carry on his business for a definite time after his death, for the benefit of his estate, or appoints *trustees* for such a purpose, they will not be responsible to *the estate* for any loss resulting in the course of an honest administration of the trust, but that is not the case presented by this codicil. Here, the purpose of the testator obviously was, not to have his business continued for the benefit of his estate, but to bestow a benefaction upon these parties as legatees. He had conducted his business for fifty years with success, having accumulated thereby a handsome fortune, and all the capital invested in it was his own. Bennett and Reese had been his chief clerk and bookkeeper, and in addition to what he had given them by his will, he designed by this codicil to give them for their own individual benefit and advantage, the use, without interest, of all this capital in carrying on the business for a specified period, accompanied however with the obligation to return the same to his estate at the end of that time. This is our reading and construction

of the instrument. His intention manifestly was to confer a *benefit*, not to impose the performance of a *duty*, or the execution of a *trust*. Bennett and Reese were to have the use of the capital without interest, and all the profits of the business. This was a gift or benefit which they were at liberty to accept or reject, but the acceptance of which bound them to the accompanying obligation to return and make good the capital they so used. We therefore hold, that the amount of this capital became, after the expiration of the three years, a *debt* due to the estate by these parties.

The next question is, whether this is a case within the jurisdiction of a court of equity? The bill (which was demurred to) was filed by parties who are specific and residuary legatees under the will, and after averring that Bennett and Reese are liable for the capital so received and used by them, charges in substance, 1st, that they and the widow, Mrs. Hoffman, had construed the codicil to mean that the capital was left in their hands for the benefit of the estate, and as they had exercised proper care in its management, they are not liable for its loss; 2d, that the complainants have requested Mrs. Hoffman, and Bennett, the executors, to collect and secure this claim, but they have declined to take any steps in the premises; and 3d, that Bennett and Reese are without means to pay the same, and unless the claim be treated as an advance to them of their legacies, and the same be charged with its payment, they will convey away their interests in the estate, leaving the complainants without any relief. The bill then prays that the estate may be administered and settled under the jurisdiction of a court of equity; that the will and codicil may be construed by the court, and upon such construction that an account may be stated by which the executors shall be charged with the capital left in the hands of Bennett and Reese; that the interests of these parties in the estate charged with the payment of this claim, and that the same be deducted from their interest in the estate, when the time shall come for distribution thereof; and for general relief. The case as thus stated, has, certainly, many very peculiar features. One of the executors is a party owing a large debt to the estate.

The other executor unites with him in placing an erroneous construction upon the will of their testator, by which the existence of any such debt is denied and utterly repudiated, and therefore *both refuse* to take any steps to collect it. Both parties also by whom the debt is due, are without means to pay the same, unless it be charged upon their interests in the estate. Under these peculiar circumstances, we are of opinion, that the complainants, who are legatees, and deeply interested in the due and proper administration of the estate, have a right to the intervention of a court of equity to its aid, in construing the will and codicil, in enforcing the collection of the debt, and in protecting their interests. If, then, there be jurisdiction in equity, we see no valid objection to that part of the decree appealed from, which appoints a receiver with power to receive and collect the sum ascertained and ordered to be paid. The appointment of such an officer was but a proper means, under the circumstances, of enforcing the court's decree. Nor do we perceive any error, demanding reversal in that part of the decree which relates to the payment of interest on the principal sum due. It is true, this interest, whatever it may be, belongs, under the will, to Mrs. Hoffman, the life-tenant, and not to these complainants, but as we understand it, the decree simply directs payment of the principal sum, "with any interest that *may be due* thereon," so that if the parties ordered to pay, shall produce a relinquishment or release of the interest by Mrs. Hoffman, they are not, by the terms of the decree, required to pay it to the receiver. After the money is thus collected by the receiver, the decree properly directs him to bring it into court, so that it may be applied, under the order of the court, as directed by the terms of the will.

The appeal of the complainants brings up the question whether the amount of the debt is correctly stated in the decree. The amount of capital taken by Bennett and Reese under the terms of the codicil, as stated in the auditor's account, which the decree adopts and ratifies, is \$9,620 18. This result the auditor has reached from an examination of the administration accounts passed in the Orphans' Court, by the executors, as well as from the testimony taken before him ; and

he is clearly right, unless the claims preferred by Bennett and Reese against the estate, are open to assault under the present bill. Much of the testimony taken before the auditor was directed to the correctness of these claims, and we agree with him that the issues in this case involve no such question. These claims, proved and passed by the Orphans' Court, are allowed in the first administration account, which was passed in December, 1876, and the accuracy of that account the complainants have not impeached in their bill. This bill, which was not filed until April, 1880, contains no averment under which proof could be admitted tending to surcharge and falsify this account.

Decree affirmed, and cause remanded.

As to liability of personal representatives carrying on testator's business, see *Brasfield v. French*, 2 Am. Prob. R. 607, and cases in note; and *Caskie v. Harrison*, *infra*.

CASTOR *vs.* JONES.

[86 Indiana, 289.]

INSTRUMENT IN NATURE OF CONTRACT HELD A WILL.— ANNUITY.

A writing conveying certain personalty and realty to deceased's son-in-law, for the natural life of deceased and his wife, the devisee to pay the taxes annually, take care of deceased and his wife while they lived, pay their funeral expenses, and take care of their daughter till married, and "pay me \$250 by the first of January in each year during the natural lifetime of myself and wife" is a valid will and creates an annuity of \$250 in favor of testator's widow, which is a charge on the land devised.

FROM the Montgomery Circuit Court.

G. B. Hurley, B. Crane and A. B. Anderson, for appellants.

A. Thomson, T. H. Ristine, B. T. Ristine, P. S. Kennedy and W. T. Brush, for appellees.

ELLIOTT, J. The appellant claims that under the will of her deceased husband, Isaac Castor, she is entitled to an annuity of \$250, and that is a charge upon the real estate devised to Daniel Rhodes. The Circuit Court decided against her, and she prosecutes this appeal.

The provisions of Isaac Castor's will which materially affect the case are these : " 1st. I give and bequeath to my son-in-law, Daniel Rhodes, all of my personal property now on the farm where I reside, with the exception of one black mare and three milk cows, for to have and to hold for and in consideration hereinafter mentioned. 2d. I give and bequeath the farm where I now live to the said Daniel Rhodes, described as follows, to wit: The east half of the northeast quarter of section 30, township 19 north, of range 3 west, for to have and hold and have full use of in every way during the natural life of myself and wife, Amy Castor, said Rhodes for to pay the tax on said property, both real and personal, according to law, and bring me the receipts for the same yearly; for and in consideration of the above, said Rhodes is to take care of me and of my wife Amy during our natural lifetime, and be at all expense every way in doctoring and funeral expenses; said Rhodes is to take care of my daughter Indiana so long as she remains single, and she is for to have two good beds and bedding that she now has; said Rhodes is for to pay me \$250 by the first of January in each year, commencing January, 1875, during the natural lifetime of myself and wife; if said money is not paid at the time, for to draw ten per cent. interest; said Rhodes to have full and free possession of said property during the natural lifetime of myself and wife. 3d. Said Daniel Rhodes for to have all my property, both real and personal, at the death of myself and wife." Following these provisions, which we have copied literally, are items making small bequests to various kinsmen and requiring Rhodes to pay them. The will closes with this paragraph: " Said Rhodes for to live on said farm and in said house with me; for to comply with said will during the natural lifetime of myself and said wife; for to have all notes, money and effects belonging to me at the death of myself and

wife; if said Rhodes leases said farm this for to be null and void." The complaint alleges that Rhodes accepted the provisions of the instrument and is in absolute possession of the property devised to him, and that the validity of the will was judicially declared by the Montgomery Circuit Court, in a cause wherein the appellees were plaintiffs and Daniel Rhodes was defendant.

It is true, as appellees contend, that the instrument has many of the elements of a contract, but the intention of its author to make it a testamentary disposition is, nevertheless, clearly apparent. No matter what may be the form of the instrument, if the intention to make such a disposition of its author's estate is disclosed, it will be treated as his will. Thus a will may be expressed in letters. (*Wagner v. McDonald*, 2 Har. & J. 346; *Morrell v. Dickey*, 1 Johns. Ch. 153.) Or in an instrument in form a power of attorney. (*Rose v. Quick*, 30 Pa. St. 225.) So in the form of a deed. (*Turner v. Scott* 51 Pa. St. 126; *Miller v. Holt*, 1 Am. Prob. Cases, 199; *Carlton v. Cameron*, 38 Am. R. 620.) So, too, it may be in form and in some substantial respects a contract. (*Green v. Froud*, 3 Keble, 310; *Hixon v. Wytham*, Ch. Cases, 248.) There can be no doubt as to the character of the instrument; it is in form a will, it professes to be a will, and its principal provisions are those of a will. This court has passed upon the character of this instrument, and declared it to be a will. (*Jones v. Rhoads*, 74 Ind. 510.)

The character of the instrument being certain, the work of the court is to ascertain its meaning. As the books put it, "the intention of the testator is the polestar," and the instrument is to be so construed as to carry that into effect. All the provisions of the will are to be taken into consideration, and isolated expressions are not to control the general tenor of the instrument.

The draftsman of the will of Isaac Castor was, it is evident, not an educated person. His lack of knowledge of matters of law, his defective command of words, and his confused jumbling together of discordant things, have clouded, but not obscured, the intention of the testator. The desire of Isaac

Castor to provide for his wife is strongly and clearly expressed in all the provisions of the will. It appears in every clause in which a burden is imposed upon the devisee. Wherever anything of benefit is provided for, it is for the joint benefit of the testator and his wife. In not a single instance throughout the entire will is there a severance, unless the clause "pay me" shall be deemed to create it as to the annuity of \$250, here the subject of dispute. Is it not reasonable to presume that a husband who, with such solicitous care, had united his wife's name with his from the beginning to the end of the will, meant to secure for her the small annuity provided? Is it just to presume that, having made all the beneficial provisions of the will apply to both of them, he here reserved the annuity to himself alone?

Clauses in a will are to be construed by the aid of clauses or words with which they are grouped. The clause providing for the annuity is grouped with provisions for the care of the wife during her lifetime, and after the testator's death, with a clause providing for the care of the testator's daughter, and with other clauses of a strictly and purely testamentary character. The just construction, therefore, is that this clause, too, was meant to operate for the benefit of the wife after the testator's death. It would violate a just rule of construction to wrench the clause providing for the annuity from its associate clauses and give it a meaning peculiar to itself, and at variance with its connectives.

The language of the particular case under discussion is: "Said Rhodes is for to pay me \$250, by the first of January in each year, commencing January, 1875, during the natural lifetime of myself and wife." There is here a time fixed for the commencement of the payment of the annuity, and that is during the testator's lifetime, and this may not be, in strictness, a testamentary disposition; but it by no means follows that it vitiates that part of the clause which is such a disposition. The provision for the payment during the lifetime of the wife, is certainly as clearly of a testamentary character as any other part of the instrument. The time of pay-

ment commences before, but continues after, the testator's death.

Considered under strict legal rules, the clause secures the annuity to the wife if she survives the husband. The rule is that an obligation or duty to pay an annuity to husband and wife during their lives secures the annuity to the survivor, although there are no express words creating a right of survivorship. (*Douglas v. Parsons*, 22 Ohio St. 526; *Merrill v. Bickford*, 65 Me. 118.) This rule here harmonizes with the intention of the testator, as manifested in the great body of the provisions of his will, and ought not to be broken in upon because of the ignorance or unskillfulness of the draftsman of the will.

Faulty expressions and inaccurate words cannot be permitted to defeat a testator's intention, if there be enough to disclose it; nor will detached clauses be allowed to thwart it, if it can be discovered from all the provisions taken together. The general intent, not particular phrases, controls, and this intent overrides all merely special or particular expressions. (1 Redf. Wills, 433.) . As some of the cases say, the intent is to be gathered "from all the four corners of the instrument." Every substantive provision of this will expresses the testator's desire to secure its benefits, one and all, to his wife, and, when combined, the provisions leave no uncertainty as to the intention of the testator. The last clause of the will strongly and plainly exhibits the purpose to make sure that during his wife's lifetime she shall enjoy all the benefits of the provisions of the will. It is there written, quaintly enough, "Said Rhodes for to comply with the said will during the lifetime of myself and wife." This provision extends to all, not merely part, of the testamentary clauses of the will. It includes that concerning the annuity as well as every other. We can perceive no reason for severing this provision from those with which it is associated, or for declaring it to be without the broad, sweeping conclusion of the will. There is nothing in the instrument except the words "pay me," which supplies the appearance of reason for excluding from this concluding clause the provisions creating the annuity, and

the whole tenor of the instrument, as well as the language with which the expression is directly and immediately connected, shows that the testator meant that the annuity should be continued throughout the lifetime of his wife.

Where legacies are charged upon land, says Mr. Jarman, "annuities will generally be included, unless the testator manifests an intention to distinguish them." (3 Jarman's Wills, 434.) In this case, however, there can be no doubt upon this question, for the annuity is bound up with all the legacies of the will, and it is impossible to conceive a charge as existing in favor of some of the beneficiaries and not all. Under the rule acted upon in *Parks v. Perry*, 2 Blackf. 74, the widow, in case of a struggle for priority, would be preferred. We have, however, no such question here, for it is not insisted that there is a priority of right, but that an annuity is not within the rule charging legacies upon land. To the authority already referred to, we add *Mitchener v. Atkinson*, 63 N. C. 585; *Morgan v. Titus*, 2 Green's Ch. 201. The annuity is in truth a legacy. The form in which it is given does not change its legal force.

Lindsey v. Lindsey, 45 Ind. 552, decides that legacies given in the manner those here are bestowed, are charges upon the real estate specifically devised to and accepted by the principal devisee. In that case the court cite many cases sustaining this doctrine, and quote, as expressing the rule correctly, the following from Willard's Eq. 489: "But where the real estate is devised to the person who by the will is directed to pay the legacy, it has frequently been decided that such legacy is an equitable charge upon the real estate so devised, although the devisee is also the executor, or is the residuary legatee of the personal estate; unless there is something in the will itself to indicate a contrary intention on the part of the testator." Judge Story states the rule in even broader terms. (1 Story's Eq. 566.) In *Harris v. Fly*, 7 Paige, 421, the court said: "The testator does not in terms create an equitable charge upon the devised premises for the payment of the two legacies to the daughters. But that was not necessary; as the charge of a legacy upon the real estate of the testator, either in aid of or

in exoneration of the personalty, may be and frequently is created by implication merely. * * * But where the real estate is devised to the person who by the will is directed to pay the legacy, it has frequently been decided that such legacy is an equitable charge upon the real estate so devised." In the fifth American edition of Jarman on Wills, the editors have collected many cases declaring and illustrating this doctrine. (3 Jarman's Wills, 402 n.) Cases decided since *Lindsey v. Lindsey*, *supra*, declare and enforce the principal there laid down. (*Wilson v. Piper*, 77 Ind. 437; *Bennett v. Gaddis*, 79 Ind. 347.)

The court erred in sustaining the demurrer to the second paragraph of the complaint, and the judgment must be reversed.

WORDEN and WOODS, JJ., dissent.

HERBERT vs. BERRIER.

[81 Indiana, 1.]

TESTATOR'S NAME SIGNED BY SUBSCRIBING WITNESS.—FORMAL REQUEST TO WITNESSES TO SIGN UNNECESSARY.

Testator's name may be signed to a will by a subscribing witness and the acknowledgment of the execution of the will by testator in the presence of witnesses is an adoption of the signature.

A formal request to the witnesses to sign is not necessary; it is enough if the will was subscribed to as such by the testator in their presence, and by them as witnesses in the conscious presence of the testator.

FROM the Porter Circuit Court.

W. E. Pinney, for appellant.

J. Bradley and J. H. Bradley, for appellees.

ELLIOTT, C. J. This case was tried upon an agreed state-

ment of facts. We extract from the statement such facts as are essential to a proper understanding of the questions presented by this appeal.

On the 3d day of October, 1848, John Berrier, Sr., executed an instrument purporting to be his will. To the instrument is affixed the signature of Berrier, and following it is written, "Signed and sealed in the presence of Alonzo Whitcomb, Esq., Elisha Keith." John Berrier, Sr., died on the 6th day of January, 1872, having both real and personal property. On the 6th day of February, 1872, the instrument was produced to the clerk of Porter county, and by him admitted to probate. Proof of the execution of the will was made by the affidavits of Edney L. Whitcomb, Salome Kouts and Perry C. Kouts. The affidavit of Edney L. Whitcomb stated that he was the son of Alonzo Whitcomb, who was a subscribing witness to the will of John Berrier, Sr.; that the said Alonzo is dead; that the affiant was well acquainted with the subscribing witness' handwriting, and that the signature attached to the will "is the genuine signature of Alonzo Whitcomb." The affidavit of Salome Kouts stated that she nursed Berrier (who was ill at the time the will was executed); that she was present when the will was signed; that Alonzo Whitcomb and Elisha Keith subscribed their names as attesting witnesses at the testator's request, and that the will produced by the proponents was the identical will so signed and attested. Perry C. Kouts states, in his affidavit, that he has made diligent search and inquiries, and can get no information that will enable him to find the residence of Elisha Keith, and that he has reason to believe, and does believe, that Keith is not a resident of the State of Indiana.

A will must be executed in accordance with the law. Upon this point there cannot well be two opinions. (*Patterson v. Ransom*, 55 Ind. 402.)

Our first work is to ascertain whether the instrument, about which this contest is waged, was executed in conformity to the requirements of the law. The law in force at the time the will was signed provided that no will should be effectual to pass any estate unless it was in writing, and signed by the tes-

tator, or some person in his presence, and by his express direction, and subscribed in his presence by two or more competent witnesses. (R. S. 1843, p. 491.) The law in force at the time of Berrier's death was substantially the same, as to the attestation of a will, as that in force when the will was signed and attested. (2 R. S. 1876, p. 572.)

We think the evidence adduced by the proponents at the time the will was offered for probate shows that the signature of Berrier was written to the will upon his express direction. This is a sufficient compliance with the requirement of the law that the will shall be signed by the testator, or by some one by his direction. It is not necessary that it should be shown that the testator was incapacitated by illness or otherwise from affixing his own name to the instrument. It is enough if it appears that he directed the person who wrote his name to do it, in execution of his purpose to make a will.

The testator's name may be written by one of the subscribing witnesses. If the person who subscribes as a witness is competent for that purpose, he is a fit person to write the testator's name at his request. (*Smith v. Harris*, 1 Rob. Ec. 262; *Robins v. Coryell*, 27 Barb. 556.) The evidence adduced also shows that the testator expressly acknowledged, in the presence of the subscribing witnesses, the execution of the will, and this is an adoption of the act of the person who signed for him. (*Haynes v. Haynes*, 1 Am. Prob. Rep. 263; *Turner v. Cook*, 36 Ind. 129.)

The attestation is sufficient in form. No precise form is required. It will be sufficient if that adopted shows that the testator's signature was affixed in the presence of the witnesses. There are, indeed, many cases holding that no attestation clause is necessary. (3 Jarman's Wills, 5th Am. ed., p. 763, authorities in note.)

The proponent of a will is not bound to prove, in the first instance, that the subscribing witnesses were competent. The presumption is in favor of their competency, and this prevails until overcome by evidence or countervailing presumptions.

It is not necessary to prove a formal request to the witnesses. It is enough to show that the will was subscribed to as

such by the testator in their presence, and by them as witnesses in the conscious presence of the testator. (*Matter of the Will of Allen*, 1 Am. Prob. R. 580. See also authorities cited in note to *Mandeville v. Parker*, 1 Am. Prob. R. 106; *Turner v. Cook*, 36 Ind. 129; *Brown v. McAlister*, 34 Ind. 375; *McElfresh v. Guard*, 32 Ind. 408; *Cheatham v. Hatcher*, 32 Am. R. 650.)

Proof of the genuineness of the signatures of the attesting witnesses was properly made by proving their handwriting. It may be inferred from evidence of handwriting, that signatures are genuine. A party who shows that a name is in the handwriting of the person whose signature is in question, has a right, in the absence of anything to the contrary, to have an inference of its genuineness made in his favor. Nothing being shown to the contrary, it was proper to infer from evidence that the signatures were in the handwriting of the persons whose names were annexed as subscribing witnesses, that the signatures were written by them. But, if this was not so, the affidavit of one of the witnesses shows that the subscribing witnesses affixed their signatures in her presence, as well as in that of the testator, so that there can be no doubt as to the genuineness of their signatures.

Judge Redfield says that "The general rule is that the capacity to execute wills extends to all." (1 Redf. Wills, 8.) In *Sloan v. Maxwell*, 2 Green's Ch. (N. J.) 563, it was said, that it is a "fixed principle, that whenever the formal execution of a will is duly proved, he who wishes to impeach it on the ground of incompetency, must support by proof the allegation he makes, and thereby overcome the presumption which the law raises of the sanity of the testator." (*Rush v. Megee*, 36 Ind. 69; *Banker v. Banker*, 63 N. Y. 409; *Baxter v. Abbott*, 7 Gray, 71.) The appellant contends that our statute requires that affirmative evidence of testamentary capacity must be adduced before the will can be admitted to probate. The basis of this contention is supplied by section 30 of the act concerning wills, which reads thus: "If it shall appear from the proof taken, that the will was duly executed, the testator at the time of executing the same competent to devise his property, and

not under coercion, such testimony shall be written down, subscribed by the witness examined, and attested by said clerk with his signature and seal of office; and the will, with such testimony and attestation, shall be recorded by such clerk in a book kept for that purpose, and certified by him to be a complete record." This section is to be taken in connection with other provisions of the same act, and, when so taken, cannot be construed to overturn settled rules of evidence, and to require a proponent to show, not only testamentary capacity, but also freedom from restraint. We think the natural presumption of competency must prevail, unless something countervailing it appears. In the statute defining murder, the provision expressly refers to persons of sound mind, and yet the courts have universally held that sanity is to be presumed until the contrary is made to appear. The proof of the formal execution of the will, together with the contents of the will itself, may well be held to supply grounds for inferring the competency of the testator. We cannot believe that the Legislature ever intended that the proponent of a will should, in the first instance, prove sanity and freedom from coercion. The language of section 27 of the statute lends strong confirmation to this view. It is there provided: "Before a written will shall be admitted to probate or letters testamentary, or administration with the will annexed, shall be granted thereon, such will shall be proven by one or more of the subscribing witnesses, or if they be dead, out of the State, or have become incompetent from any cause since attesting such will, then by proof of the handwriting of the testator, or of the subscribing witnesses thereto." This contemplates no more than due proof of the formal execution of the will, and clearly means that when such proof is made, the will shall be admitted to probate. It certainly does not mean that in advance of any imputation of want of capacity, or of a showing of the presence of duress or undue influence, the proponent shall give evidence of sanity and liberty of action.

We are not called upon to decide what the rule would be in case of an objection interposed before the admission to probate. If the objection had been made before probate, there would be much more force in the position, that the proponent

must prove testamentary capacity and the absence of coercion. But upon this point there is great diversity of opinion; the weight of authority seems to be that even in such cases the proponent is not bound, in the first instance, to give evidence of capacity and freedom from restraint.

Where, as in the case before us, the will has been admitted to probate, is reasonable on its face, and its execution unattended by suspicious circumstances, some evidence of want of capacity and of the presence of fraud or coercion must be given by the party who attacks the will, before the party who propounds the will can be called upon to prove, what the law presumes, the presence of capacity and the absence of fraud. It would be an unnatural and strained perversion of the rules of logic to hold that a party must, where nothing is shown in opposition, proceed to establish what the law presumes; where the ultimate burden shall rest is another question.

The thirty-ninth section of the statute, giving the right to contest wills which have been admitted to probate, very clearly casts upon the complainants the burden of giving some evidence of coercion or incapacity before the party supporting the will can be required to give evidence of capacity and freedom from undue influence. This case is governed by that section, for it is an action brought to overthrow a will already admitted to probate.

The proponents proved the handwriting of the attesting witnesses, and this was sufficient under the provisions of the statute already quoted. The evidence did much more than this, for it directly proved that the witnesses subscribed their names to the paper in the presence of the testator. The affidavit of Salome Kouts shows the actual signing by the witnesses of their names, and shows also that one of them, at the time, signed the testator's name pursuant to his request. The evidence upon this point could not well be stronger.

The statute makes express provision for proving the execution of wills where the witnesses are dead, or out of the State. The evidence brings the case fully within the provisions of the statute. It is clearly shown that one of the subscribing witnesses was dead, and that the other was out of the State

and could not be found. This was amply sufficient to permit the introduction of evidence of the handwriting of the witnesses.

We have considered all the questions which can properly arise under the allegations of the complaint, and find no error in the record.

The complaint is in many respects subject to criticism. The general allegation, that "the will has been admitted to probate unlawfully and without sufficient proof," is too vague and uncertain. The defects in the proof, or the facts making the "probate unlawful," should be stated. Mere conclusions, such as that stated, are not sufficient; there should be allegations of substantive facts.

Judgment affirmed.

Petition for a rehearing overruled.

See *Haynes v. Haynes*, 1 Am. Prob. R. 268; *Estate of Toomes*, Id. 275.

RAY vs. MCGINNIS.

[81 Indiana, 451.]

LOAN TO GUARDIAN ON VOID MORTGAGE OF INFANT'S REAL ESTATE.

Money loaned to a guardian upon a void mortgage of the infant's realty, executed under an order of court, constitutes a claim against the estate in favor of the lender.

FROM the Marion Circuit Court.

W. Wallace and *L. Wallace*, for appellant.

H. Dailey and *W. N. Pickerill*, for appellees.

BEST, C. The appellant, as receiver of the Indianapolis Savings Bank, brought this action against the appellees. In

the second paragraph of the complaint, it was substantially averred that George F. McGinnis had been duly appointed the guardian of Lillie Galloway, and, on the 28th day of November, 1876, as such guardian, he made his report to the Circuit Court of said county, showing that his ward's estate was indebted in the sum of \$939 62, and that \$369 63 of such sum was due for taxes, tax sales and street improvements, which were liens upon real estate owned by his ward; that at the same time he filed his petition, showing that his ward had no means with which to pay said claims; that it was for the best interest of his ward's estate to borrow sufficient money with which to pay said claims, and to secure its payment by executing a mortgage upon lot one (1) in square eleven (11), in Indianapolis, Marion county, Indiana, then and now owned by said ward; that the court, being of opinion that it would benefit the estate of said ward to borrow the money, authorized and directed said McGinnis, as guardian, to borrow \$400, for a period not exceeding five years, at not more than ten per cent. interest, and to secure its repayment by executing a mortgage upon said lot; that said McGinnis, after procuring said order, applied to the Savings Bank, a corporation existing by virtue of the laws of Indiana, for a loan of said sum, which sum said bank loaned him, and took from him a note for the same, payable one year from date, with interest at ten per cent. and five per cent. attorney's fees, and also a mortgage on lot one, copies of which are filed with the complaint, which note and mortgage were made by said guardian to secure said loan, and the money so obtained was applied by said guardian in payment of said claims, all of which greatly benefited the estate of said ward; that said note is due and unpaid, and that said guardian refuses to pay the same; that, since the execution of said note, said bank has gone into liquidation, and this plaintiff has been duly appointed receiver, etc.; that said note and mortgage have duly come into his hands as a part of the assets of said bank. Prayer that the claim may be allowed against the estate of said ward and the guardian be directed to pay it out of the personal estate; that, if that cannot be done, the guardian be

ordered to file his petition for the sale of some of the real estate of the ward to pay the claim.

A demurrer by McGinnis as guardian, and by him personally, for the want of facts, was sustained to the complaint. A like demurrer by Lillie Galloway was also sustained, and final judgment rendered for the appellees.

These rulings present the only questions in the record.

The demurrer by Lillie Galloway was properly sustained, as she was neither a proper nor a necessary party. (*Vogel v. Vogler*, 78 Ind. 353.)

No personal judgment is sought against McGinnis, and for this reason the ruling upon his demurrer becomes immaterial.

The ruling upon the demurrer by McGinnis, as guardian, is the only question argued.

The appellee, McGinnis, insists that a guardian has no power to mortgage the real estate of his ward, and this is conceded by appellant. It is further insisted, that as the note is in the usual form, signed "Geo. F. McGinnis, guardian of Lillie Galloway," it does not bind the ward's estate, and in support of this position, the cases of *Hays v. Crutcher*, 54 Ind. 260; *Hayes v. Matthews*, 63 Ind. 412; and *Hayes v. Brubaker*, 65 Ind. 27, are relied upon. These cases seem to support the position taken.

The appellant, however, insists that notwithstanding the fact that the court may have had no authority to authorize the guardian to mortgage the real estate of his ward, yet the money furnished by the appellant, under the circumstances stated in the complaint, constitutes a claim against such ward's estate. Our statute does not expressly authorize a guardian, with or without an order of court, to borrow money for the benefit of his ward's estate, and if such power is possessed, it is implied in order to enable him to discharge the duties imposed upon him by the statute.

Section 9 of "An act touching the relation of guardian and ward" is as follows: "It shall be the duty of every guardian of any minor; * * * *Second.* To manage the estate for the best interest of his ward. * * * *Fifth.* To pay all just

debts due from such ward, out of the estate in his hands," etc.

Unless this statute confers the authority, it is not possessed. This statute imposes the duty upon the guardian to manage the estate for the best interest of his ward, and to pay all just debts of his ward out of her estate in his hands. The manner of discharging this duty depends largely, if not wholly, upon the condition of the estate. If it consists of money, the debts, if any, may be easily paid, and the estate managed without difficulty; if it consists of realty, it may or it may not be necessary to sell it in order to pay the debts. Whether it should be sold, depends upon circumstances. If it consists of productive real estate, the rents of which will, within a reasonable time, enable the guardian to extinguish the debts, a sale of the property at its full value to pay the debts might not be advisable; if it consists of unproductive real estate, that probably could not be sold without a great sacrifice, and the incumbrance can be carried at a reasonable rate of interest until such time as an advantageous sale can be made, or the incumbrance otherwise removed, it would seem that the duty imposed by the statute would authorize, if not require, the guardian to thus manage the estate. Otherwise, the very rules of law, adopted for the protection of such estates, would operate to destroy them, as the person appointed to manage them is powerless to do so, at the very time when management is most needed. Suppose the incumbrance had been a mortgage, drawing the highest rate of interest allowed by law, and the guardian, under the order of the court, had carried it by paying the interest from time to time, would it be contended that such payments do not constitute proper charges against the ward's estate? If the guardian, instead of carrying the supposed incumbrance, had paid it under the order of the court, in order to protect the interests of his ward, would he not be allowed the amount so paid, with interest, as a charge against the ward's estate? We have no doubt of it, and we think that the appellant, having furnished the money at the instance of the guardian, under the order of the court, and the same having been applied in pay-

ment of the claims against the ward's estate, is entitled to recover the same from such estate.

For these reasons, we think the court erred in sustaining the demurrer of the guardian, and for this error the judgment should be reversed.

LOFTON vs. MOORE.

[83 Indiana, 112.]

ENFORCING LEGACY AGAINST LAND AND DEVISEE BEFORE EXHAUSTING PERSONALTY.

A legacy charged on testator's real estate and also directed to be paid by the widow out of property devised to her for life, consisting of realty and all testator's personalty, may be enforced against the real estate, and as a personal claim against a devisee, entering upon the land charged, without resorting to or exhausting the personal estate remaining at the widow's death.

FROM the Washington Circuit Court.

D. M. Alsbaugh and *J. C. Lawler*, for appellant.

A. B. Collins, for appellee.

Howe, J. In his complaint in this case, the appellee, Moore by William Knowles, his next friend, alleged in substance that he, William H. Moore, was the grandson of one, Simeon Lofton, who died testate in April, 1877, in Washington county, Indiana; that he, the said Simeon Lofton, died the owner and seized in fee simple of certain real estate in said county, particularly described; that the said Simeon Lofton, by his last will, which was duly probated on the 28th day of April, 1877, in the clerk's office of said county, devised his said real estate to his wife, Matilda Lofton, for and dur-

ing her natural life, without any incumbrance whatever, and, at her death, to the appellant, Alexander Lofton, in fee simple; that, by the terms of his will, a legacy of three hundred dollars was bequeathed by the testator to the appellee, William H. Moore, payable to him when he became twenty years of age, and made by the will a lien upon all said real estate; that, after the testator's death, the said Matilda Lofton took possession of said real estate and held the same during her life, that she departed this life, without having remarried, in March, 1880, and the said real estate became the property of the appellant and he accepted the provisions of said will and took possession of said real estate as the owner thereof, subject to the legacy of the appellee, Moore; that the appellee became twenty years of age on the 15th day of January, 1880, and he had demanded payment of said sum of three hundred dollars from the appellant, who had refused to pay the same. Wherefore the appellee demanded judgment for \$350, and for the foreclosure of said lien, etc.

The cause was put at issue and tried by the court; and a finding was made for the appellee, and over the appellant's motion for a new trial, and his exception saved, judgment was rendered for the appellee, as prayed for in his complaint.

In this court, the overruling of his motion for a new trial is the only error assigned by the appellant. The only causes for such new trial, assigned in the motion therefor, were, that the finding of the court was not sustained by sufficient evidence, and that it was contrary to law.

Before considering any of the questions arising under the error assigned by appellant, it is proper that we should dispose of a point made in argument by appellee's counsel. It is earnestly insisted by appellee's counsel, that the record of this cause shows that it was an agreed case, under the provisions of section 386 of the civil code of 1852. In an agreed case, no motion for a new trial is necessary, but the party aggrieved must except to the decision of the trial court, upon the agreed statement of facts, and unless the record shows that an exception was taken to the decision at the proper time, it will present no question for the decision of this court. This point

is settled by the decisions of this court. (*Fisher v. Purdue*, 48 Ind. 323; *Manchester v. Dodge*, 57 Ind. 584.)

The record of this cause fails to show that the appellant saved an exception to the decision of the court upon the agreed statement of facts, and if this case could be regarded as an agreed case, under the code, we would be bound to hold that the appellee's point was well taken, and that no question had been properly saved in the record for the decision of this court; but we cannot regard the case at bar as, in any proper sense, an agreed case, within the meaning of the code. The record shows that the case was put at issue in the ordinary mode, by answers to the complaint and by a reply to the special answer. These issues were, "by consent of parties, set down for trial by the court, without the intervention of a jury." The bill of exceptions shows, and it appears nowhere else in the record, that the cause was tried by the court upon an agreed statement of facts, to which was appended an affidavit of one of the attorneys in the case, to the effect that the controversy was real, and the proceedings in good faith to determine the rights of the parties. It is very clear, however, as it seems to us, that this agreed statement of facts was not considered by either of the parties below, or by the trial court, as constituting an agreed case, within the meaning of the code. The agreed statement of facts was intended to be used, and was used, on the trial merely as the evidence in the case. So the court certified in the bill of exceptions, after setting out therein the agreed statement of facts, that "this was all the evidence given in the cause." It was competent for the parties, after issue joined, instead of introducing evidence on the trial, to agree in writing upon the facts which the evidence would establish, and this is all, we think, that the parties intended to do, or did, in the case at bar. In such a case, a motion for a new trial is necessary, and the agreed statement of facts must be made a part of the record, either by a bill of exceptions or by an order of the court.

It is necessary to the proper presentation of the questions arising under the alleged error of the court, in overruling the appellant's motion for a new trial, that we should give the sub-

stance, at least, of the agreed statement of facts, which we now do accordingly :

“ The parties to this cause admit that the plaintiff, William H. Moore, is the grandson of Simeon Lofton, deceased, who died testate at Washington county, Indiana, in April, 1877, and was at the time of his death the owner of the real estate described in the complaint in this action ; that said Simeon Lofton left a will, which was duly probated on the 28th day of April, 1877, in the clerk's office of said county, and was in the words and figures following, to wit :

“ ‘ I, Simeon Lofton, of Washington county, and State of Indiana, being of sound mind and memory, do make and publish this, my last will and testament: Item 1. I will and bequeath to my grandchild, Anna L. Moore, the sum of three hundred dollars, to be paid to her when she may become eighteen years of age ; and I further will and bequeath unto my grandchild, William H. Moore, three hundred dollars, to be paid to him when he shall become twenty years old ; to be paid to them by my widow, Matilda Lofton, out of the property that I herein will to her ; and in case either one of said grandchildren should depart this life before they arrive at the age herein named to receive said legacy, then and in that case the surviving grandchild shall receive the deceased child's portion or legacy.’ ” (Item 2 has no bearing on this case and is omitted.)

“ ‘ Item 3. I will and bequeath unto my wife, Matilda Lofton, all of my personal property of every description, not heretofore otherwise disposed of. And I further will and bequeath unto her, my said wife, all of the real estate that I may own at the time of my death, to hold, enjoy, have, control and use, without any incumbrance whatever, during her natural life, or until she may marry, and that she shall pay all of my just debts and funeral expenses, and the legacies to Anna L. Moore and William H. Moore, of three hundred dollars each, as set forth in item 1st of this will.

“ ‘ Item 4. I will and bequeath that, at the death of my wife, Matilda Lofton, or of her marrying, then and in that case, or in either of those cases, I will and bequeath that my son,

Alexander Lofton, have all the real estate that I hold, of every description, to him and his heirs forever, in fee simple.

“ ‘Item 5. I will and bequeath further, that all of the real estate herein willed to my widow, Matilda Lofton, I now fully bind for the payment of the legacies of Anna L. Moore and William H. Moore, to the amount of three hundred dollars each, and that said legacies are liens on all the real estate that I own. Said legacies are set out in item 1st of this will.

“ ‘Given under my hand, the 4th day of October, 1872.

(Signed,) “ ‘SIMEON LOFTON.’ ”

(The attestation and certificate of probate of this will are not material, and are omitted.)

“That the plaintiff is the same William H. Moore named in said will; that Matilda Lofton was the wife of said Simeon Lofton, and survived him, and afterwards, in March, 1880, while yet the widow of said Simeon, she died intestate; that, after the death of said Simeon, the said Matilda took possession of the real estate described in the complaint, and, also, of over \$5,000 worth of personal property bequeathed to her by said will; that, upon her death, the said Alexander Lofton accepted the real estate named in the complaint, as legatee under the will of said Simeon, deceased, and took and still retains possession thereof, by virtue of said will; that said William H. Moore became twenty years of age on the 15th day of January, 1880, and has, since that time, and before the commencement of this action, demanded of said Alexander Lofton said \$300 bequeathed to him by said will, and that said Alexander refused to pay the same; that personal property of the value of \$5,000, was delivered to said Matilda Lofton, by the administrator with the will annexed, of the estate of said Simeon Lofton, deceased, and that she took and kept possession thereof, by virtue of said will, during her life; that since her death, one Hooker Hancock has been duly appointed and confirmed administrator of the estate of said Matilda, and is now such administrator, and has under his control, and in his possession, property belonging to her estate, and derived from the estate of said Simeon Lofton, and by virtue of his said will, personal property of the value of \$5,000; that ample

means belonging to the estate of said Matilda Lofton, and which came to her by virtue of said will, are still in the hands of said administrator to pay all claims against her said estate, including the plaintiff's claim for \$300; and that the plaintiff has made no effort to collect the said \$300 sued for, from the said Matilda Lofton in her lifetime, nor from her administrator since her death, nor from the administrator of Simeon Lofton's estate; that the defendant is the same Alexander Lofton named in the will of said Simeon Lofton; that the foregoing statement contains all the facts on both sides of the case, and it is agreed they are all true."

Upon the foregoing statement of the facts of this case, as agreed to by the parties, we are of the opinion that the finding of the trial court was clearly right, and, of course, that the court committed no error in overruling the appellant's motion for a new trial. The proper decision of the cause depended upon the construction to be given to the provisions of the last will of Simeon Lofton, deceased. In the construction of the will, it was the duty of the court to ascertain and carry into effect, if possible, the intention of the testator in regard to the matter under consideration. This intention was to be ascertained, not from any single item or clause, but from all the provisions of the will having reference to the subject of the inquiry. (*Kelly v. Stinson*, 8 Blackf. 387; *Craig v. Secrist*, 54 Ind. 419; *Fraim v. Millison*, 59 Ind. 123; *Tyner v. Reese*, 70 Ind. 432.)

It is very clear, we think, that the testator, Simeon Lofton, intended to secure the payment of his legacy to the appellee, William H. Moore, at his arrival at the age of twenty years, by making it a lien on all his real estate and fully binding the same for such payment, as he did in direct terms in the fifth item of his will. It is true, that the testator in the previous items of his will, had directed that his widow, Matilda Lofton, should pay the legacy to the appellee out of the property he willed to her. But, as if anticipating that his widow might die before the payment of his legacy to the appellee, the testator, in the last item of his will, bound all his real estate for the payment of such legacy, and expressly declared that this leg-

acy was a lien on all the real estate he owned. These provisions of the will cannot be misunderstood. In legal effect, they bound all the real estate referred to for the payment of the appellee's legacy, as fully as if the testator had, in his lifetime, voluntarily mortgaged such real estate to the appellee to secure such payment. In either case the legacy is or would be a specific lien on the real estate, and may be enforced against the real estate without resort first had to the personal estate of the testator or of the deceased mortgagor. It is well settled that a devisee of real estate, who has accepted the devised estate, is personally liable for the payment of the legacies given by the will, but this personal liability will not discharge the real estate from the lien of the legacies thereon, where, by the terms of the will, such real estate is bound for the payment of such legacies. (*Lindsey v. Lindsey*, 45 Ind. 552, and cases cited.)

It would seem, therefore, under the agreed facts of this case, that not only was the real estate, described in the complaint, bound for the payment of the appellee's legacy when it became due, but that the appellant, by his acceptance of the devised real estate, charged, as it was by the will, with the payment of such legacy, became and was personally liable to the appellee for the amount of his legacy. It is claimed, however, by the appellant's counsel, as we understand their argument, that, although the real estate may be liable ultimately for the payment of appellee's legacy, yet the real estate cannot be resorted to for such payment, in the first instance, nor until the personal estate, derived by the widow, Matilda Lofton, from the testator, and owned and possessed by her at the time of her death, has been first exhausted. We do not think so. The rights of the appellee against the real estate, under the agreed facts of the case, do not differ in principle, as it seems to us, from the rights of the mortgagee of real estate against the deceased mortgagor having personal estate to be administered. In such a case, the law makes the mortgagee a preferred creditor of the mortgagor, and his debt a preferred debt, having a priority over the general creditors of such deceased mortgagor. Yet the mortgagee is not required to file

his mortgaged debt against the estate of the deceased mortgagor, or to await the settlement and distribution of the personal estate; but he may proceed at once when his mortgage debt or any part thereof is due, to the foreclosure of his mortgage and the sale of the mortgaged real estate. (*Cole v. McMickle*, 30 Ind. 94; *McCallam v. Pleasants*, 67 Ind. 542.)

So, we think, in the case now before us, as the payment of the appellee's legacy was, by the terms of the will, secured as a specific lien upon all of the testator's real estate, we are of the opinion that after the non-payment of his legacy by the appellant who had become personally liable therefor, the appellee might lawfully proceed, at once and in the first instance, to collect his legacy by enforcing the lien thereof on the devised real estate.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

PRATT vs. MCGHEE.

[17 South Carolina, 428.]

"LEGACY" IN STATUTE DOES NOT INCLUDE DEVISE OF LAND.

The word "legacy" used in the statute providing that "if any child should die, in the lifetime of the father or mother, having issue, any legacy given in the last will of such father or mother shall go to such issue," does not include a devise of land.

APPEAL from the Fourth Circuit.

The facts appear in the opinion.

Noble & Noble, for appellants.

Parker & McGowan, *L. W. Perrin*, opposed.

HUDSON, J. In 1872, John L. Ellis, late of the county of Abbeville, made and executed his last will and testament, and in 1879 departed this life, leaving the same unrevoked.

He left surviving him five children, who are the first-named plaintiffs, and six grandchildren, three of whom, children of a deceased daughter, Eliza McDaniel, are also plaintiffs, and three others, children of a deceased son, John R. Ellis, are defendants, joined with Robert Pratt, who is the sole executor of the said will. He left no widow. The chief object of the testator's bounty was his son, John Robert Ellis, to whom, in the first clause of his will, he gave his entire real estate, consisting of a tract of six hundred and ninety-three acres of land, and also, with slight exception, all his personal property, consisting of his household and kitchen furniture and live stock of all kinds. To each of his daughters he gave thirty dollars; to the children of Eliza McDaniel, deceased, thirty dollars betwixt them, and to his grandson, Robert N. Pratt, a watch. After the making of this will, but before the death of the testator, his said son, John R. Ellis, to wit, in 1873, departed this life, leaving a widow, Margaret Ellis, and three children, Leonora McGhee, Claudia Ellis, and John R. Ellis, the two last being minors.

In this complaint, which seeks a partition and settlement of the estate of their testator, the plaintiffs claim that the gift of land and personalty to the son, John R. Ellis, lapsed by reason of his having predeceased his father, and because he had been during life more than "equally portioned" with the other children; and hence they pray that the said land and personal property set forth in the devise and bequest to him, may be partitioned among the heirs at law of John L. Ellis as intestate property. This claim is resisted by the defendants, children of John R. Ellis, who contend that their father, in his lifetime, was not equally portioned with the other children of John L. Ellis, and that the gift to him under the first clause of the said will is saved from lapsing by sec. 13, chap. lxxxvi, General Stat. 444, which is the re-enactment of sec. 9, act of 1789, 5 Stat. 107.

The original section reads as follows: "That if any child should die in the lifetime of the father or mother, leaving issue, any legacy given in the last will of such father or mother shall go to such issue, unless such deceased child was equally por-

tioned with the other children, by the father or mother when living." In the re-enactment in the Revised Statutes this language is not changed.

The circuit judge found as a matter of fact, that John R. Ellis had been, while living, greatly more than equally portioned with the other children of the testator, John L. Ellis. He further held that the term "legacy" in the 13th sec. aforesaid cannot be construed to include a devise of realty, but must be construed to apply only to a gift of personalty, according to its legal technical meaning. Under this construction of the statute, and in view of the fact that John Robert Ellis had already been equally portioned with the other children, he held that the entire devise and bequest to him in the first clause of the will lapsed upon his predeceasing his father, and became, after the death of the testator, distributable among his heirs at law as intestate property. Accordingly he decreed partition to be made as craved by the plaintiffs. This judgment is appealed from by the children of John R. Ellis, who seek in this court a reversal of the construction by the circuit judge of the statute aforesaid, under and by virtue of which they claim that the gift to their father is saved from lapse and goes to them.

After a careful examination of the entire act of 1789, which contains many sections, and a like careful examination and comparison of chap. lxxxvi, Gen. Stat. 444, with its many clauses and sections, we are constrained to conclude that the Legislature used the word "legacy" in its technical legal sense, and no other. In the sections which precede and follow this clause, both in the old and new act, the terms "devise," "bequest" and "legacy" are used invariably in this strictly technical sense, the word devise being in each section made to refer to a gift of realty, and the words legacy and bequest to gifts of personalty. It thus appears that these words are nowhere in these acts used as synonymous terms, but always with an appropriate distinction and legal significance.

The terms were well understood by the legislatures which, at the two periods separated by nearly a century, used them throughout with the closest regard to their respective differences and technical meaning. In no section of either act would

the sense be retained by substituting one of these words for the other or by enlarging one so as to embrace the others. Why then should we conclude that in this single section the legislature inadvertently used the word, "legacy" in an untechnical sense, and intended to imply thereby a gift of realty (a devise) as well as of personalty, when in all other sections the true distinction is carefully preserved?

We know of no canon of construction which, when brought to bear upon this entire act, will conduct us to such a conclusion. We are told that there is no reason why the legislature should intend to save a legacy from lapsing, which would not more strongly induce that body to likewise preserve a devise of real estate to the issue of a predeceased child; and that, therefore, we must conclude that by the term *legacy* in this clause a *devise* is likewise meant. But as the question is, not what the legislature ought to have intended, but what they *did* intend, we must examine the whole context of the act to ascertain that intention. Such examination demonstrates the fact that in every other clause of the act a gift of real estate is styled a *devise*, a gift of personal estate is called a *legacy* or *bequest*, and a gift of both real and personal property is entitled a devise and bequest. Had a joint gift of real and personal property been contemplated in the 13th section, it would have been likewise designated a devise and bequest, and not untechnically a *legacy*.

In the statute of Victoria upon this subject, and in the acts of the legislatures of all those States of the Union which have made similar provision against the lapsing of gifts to predeceased children, the terms "devise and bequest," or others equally unequivocal and comprehensive, are employed. The fact that our legislature for nearly a century has adhered to the simple word "legacy," with a full knowledge of its appropriate and limited signification, is evidence of an intention to save only a gift of personalty from lapsing. To cover realty as well as personalty, in its terms, will require further legislation. The courts cannot supply the place of legislation by enlarging the meaning of a word of limited purport, which the legislature has used knowingly and advisedly.

If this clause of the act stood alone as a separate enactment, the argument that, in the reason and nature of things, the legislature could not have intended to save from lapse perishable personal property, and to suffer the more valuable real property to pass from the issue of a predeceased child, might have been urged with special force, and would probably induce the court to widen the meaning of the term "legacy" so as to embrace all gifts, whether of land or goods. But controlled in the context of this act, as it must be, by the language that precedes and follows it, the term must be restricted to its legal sense.

Numerous cases have been cited by counsel from the law books both of England and America, where, in last wills and testaments, the use of the term legacy by the testator, the courts have held to be synonymous with, or as comprehensive as, the terms "devise and bequest." But an examination of these cases will discover the fact that the testator in each instance, used the word in a popular sense, and clearly intended thereby to embrace both real and personal estate. Without thus enlarging the meaning, the will was either unintelligible, or the clear intent of the testator would be defeated. Hence, in order to carry into effect the interest of the testator apparent from the context, the courts have very properly construed the word legacy to include land as well as personal property in many cases. As authority for this construction, see 1 Jarm. Wills, 145, note 1; 1 Redf. Wills (3d ed.),* 617; *Ladd v. Harvey*, 21 N. H. 528; *Brady v. Cubitt*, 1 Doug. 31-39. Decisions to the like effect in construing wills are numerous, the controlling guide in each case being the manifest intention of the testator. But just as in these numerous instances it was manifest that the testator intended by the word "legacy" to embrace land as well as goods and chattels in his gift, so in the case now before the court, resting upon the statute in question, it is equally clear that the legislature used the term in its technical sense.

Wherefore we concur with the circuit judge in his construction of the statute, and nothing in the brief submitted, appears as evidence to show that the son, John Robert Ellis,

was not equally portioned with the other children. The circuit judge found that he was greatly more than apportioned, and in this we see no error. He concludes that under the statute and the evidence, the whole gift, both of land and personal property, lapsed, and in this view we concur. We deem it unnecessary to notice other minor points not urged in argument, and not affecting the case.

It is the judgment of this court that the judgment of the Circuit Court be affirmed, that the cause be remanded to the Circuit Court to have the decree below carried into effect, and that the appeal be dismissed.

Meaning of words "legacy" and "devise."—A legacy, says Godolphin, is "some particular thing, given or left, either by a testator in his testament, wherein an executor is appointed, to be paid or performed by his executor, or by an intestate in a codicil or last will, wherein no executor is appointed, to be paid or performed by an administrator." Godolph. pt. 8, c. 1, § 1.

Formerly in England one could devise only lands of which he was seized at the time of the execution of the will, whereas, a will and testament would operate, as to personalty, equally upon property before or after acquired, provided only that he died possessed. *Wind v. Jekyl*, 1 P. Wm. 575.

But now under the operation of the statute of wills this distinction no longer exists, and the words "devise" and "legacy" have consequently lost much of their special technical significance. Stat. 1 Vict. c. 26, § 3.

A legacy is a gift by a last will, commonly money or chattels; but "bequest" is a more precise and appropriate term for a testamentary gift of personalty. "A legacy is said to be bequeathed, and the gift of a legacy is called a bequest." Flood on Wills, 1.

Although a legacy is a testamentary disposition, and is therefore ambulatory and revocable by the testator in his lifetime, it does not follow that it is, therefore, necessarily devoid of consideration. *Orton v. Orton*, 3 Abb. Ct. App. Dec. 411.

"A devise or legacy is where a man in his testament doth give anything to another. The first of these terms is properly applied to the gift of lands, and the last to the gift of goods or chattels, and therefore a devise strictly is said to be where a man in his testament doth give his lands to another, and a legacy is said to be where a man in his testament doth give any chattel to another to have after the death of the testator." Sheppard's Touchstone, 400.

In order, however, to carry out the intention of the testator, a wider interpretation of the word "legacy" is sometimes resorted to so as to include thereby lands. *Brady v. Cubitt*, 1 Doug. 89 (by Lord Mansfield); *Hardacre v. Nash*, 5 T. R. 716.

The word "bequeath" was held to mean "devise," in *Dow v. Dow*, 36 Maine, 211.

Where a testator, after devising certain lands to three relatives, and giving pecuniary legacies to two of them, provided that if either of the persons before named died without issue then "the said legacy" should be equally divided between the survivors, it was held that the word "legacy" in this clause included the land before devised. *Hope d. Brown v. Taylor*, 1 Barr, 268.

In Virginia a similar rule has been laid down. *Smith v. Smith*, 17 Gratt. 268.

The words "residuary legatee," though properly applicable to personal property only, may be sufficient to designate the person who takes the undevised realty, if this appears to have been the intention of the testator. *Doe v. Roberts*, 7 M. & W. 382; *Windus v. Windus*, 21 Beav. 378; s. c. 6 D. M. & G. 549; *Hughes v. Pritchard*, 6 Ch. D. 24; *Singleton v. Tomlinson*, 8 App. Cas. 404.

The word "effects" has, in several English cases, been held to include real estate. *Litchfield v. Horneastle*, 2 Jur. 610; *Franklin v. Trout*, 15 East, 394.

American cases are not numerous upon this subject. The distinction between "legacy," "bequest" and "devise," is not generally material under our statutes of wills, and the intention of the testator will determine usually in what sense the word is to be understood. The English cases cited in this note are of a date prior to 1 Vict. c. 26.

The various species of legacy are fully defined and distinguished in *Gilmer's Legatees v. Gilmer's Executors*, 42 Alabama, 9.

ROBERT vs. CORNING.

[89 New York, 225.]

SUSPENSION OF POWER OF ALIENATION.—TRUST TERMS.—NOTICE OF SALE.—DISCRETION AS TO TIME OF SALE.—CHARITABLE REQUEST.

The power of alienation is not suspended by the mere creation of a trust, but only where a sale by the trustee during the existence of the trust term would be in contravention of the trust.

The statute against perpetuities is not violated by directions which may involve some delay in the actual conversion or division of property, arising from the necessity of giving notice of sale or doing other preliminary acts.

A discretion to executors to defer the time of sale of testator's real estate, not exceeding a fixed period, involves no suspension of the power of alienation.

A restriction in a gift to the trustees of a charity, that the income only shall be used for the purposes of the charity, does not create a perpetuity.

A direction that the amount of a legacy shall be diminished by actual indebtedness of the legatee charged on testator's books, is valid.

APPEAL from a judgment of the general term of the Supreme Court in the first judicial department affirming a judgment at special term.

Action to obtain a construction of the will of Christopher R. Robert, deceased.

The will made some specific devises and bequests, including a gift of \$30,000 to testator's widow, and continued:

"*Fourthly.* All the rest, residue and remainder of my estate, real and personal, whatsoever or wheresoever, as well that I now have as that which I may hereafter acquire and die possessed of or entitled to (except such as is herein otherwise disposed of), I order and direct my executors hereinafter named, or such of them as shall qualify and act, the survivors and survivor of them, to sell and dispose of as follows, namely: such portion of the said real estate as may be in the State of New York to be sold at public sale in the city of New York, notice thereof having first been given of the time and place of sale for three successive weeks in four of the daily newspapers of the said city, giving a full proper description of the said real

estate; and the real estate in other places to be sold at such places and in such manner as my said executors deem best, and after disposing of my said real and personal property and deducting from the proceeds thereof all necessary expenses and charges, also the thirty thousand dollars bequeathed my wife as before mentioned, to divide the remainder into fifty equal parts; and if my son, Christopher R. Robert, junior, be then surviving, to pay over to him twelve equal parts thereof, but, in case of his death prior to such distribution, upon such distribution to pay over the said twelve parts to his lawful issue in equal portions, share and share alike.

“And if my son Frederick Robert be living at the time of such distribution, to pay over to him eleven of said equal parts, but, in case of his death prior to such distribution, upon such distribution to pay over the said eleven parts to his lawful issue in equal portions, share and share alike.

“And if my son Howell W. Robert be living at the time of such distribution, to pay over to him twelve of the said equal parts, but, in case of his death prior to such distribution, upon such distribution to pay over the said twelve parts to his lawful issue in equal portions, share and share alike.

“And if my daughter Jane R. Corning be living at the time of such distribution, to pay over to her five of the said equal parts, but, in case of her death prior to such distribution, upon such distribution to pay over the said five parts to her lawful issue in equal portions, share and share alike.

“And upon such division to pay over to ‘The trustees of Robert College of Constantinople’ ten of such equal shares, which, with the other bequests herein made to the said trustees of said college, are for the endowment fund of the said college, and the money derived from the said bequests is to be invested in bond and mortgage on improved productive real property in fee-simple, in the city of New York or Brooklyn, worth double the amount loaned at a low valuation,—the income only to be used for the general uses and purposes of the said college.

“In case the said college shall be discontinued, then I will that the said bequests, as well as any other bequests herein

made to the said college, shall be applied by the said trustees of said college in such manner as they may deem best for the general purposes of Evangelical and Protestant education among any of the nationalities of the Turkish empire.

“*Fifthly.* If either of my said children shall die before me, leaving lawful issue, then I give, devise and bequeath such legacies, estate, share or proportion of the one so dying unto his, her or their lawful issue; such issue to take the estate or share his, her or their parent would have been entitled to if living.

“*Item.* If either of my said children should die before me without leaving lawful issue, then I give, devise and bequeath the estate, legacies, share and proportion of my estate hereby given to the one so dying unto the survivors or survivor of them, my said children and the issue of such of them as shall have previously died leaving lawful issue, such issue to take the part or share his, her or their parent would have been entitled to if living.

“*Sixthly.* All moneys or indebtedness which shall appear upon any inventory, or ledger, or books of account kept by me or under my direction, charged as due to me from any or either of my said children or Robert College of Constantinople, during my lifetime, and as an outstanding or unsettled account at the time of my decease, whether with or without security, shall be considered as forming part of my estate mentioned or referred to in the fourth article of this my will, and a discharge from such indebtedness by my executors shall be deemed and taken as an equivalent to an equal amount paid such college, child or children, on account of its, his, her or their share and portion under this my will.

“And my executors are hereby directed to deduct the amount of such indebtedness from such respective share or portion, but no interest is to be charged upon or added to any such indebtedness except in case a bond, note or other obligation securing such indebtedness, be found among my assets, upon which said bond, note or obligation interest has been paid or charged, in which case the said indebtedness shall continue to be charged with interest.”

Charles F. Stone and John C. Gray, for appellants.

A. J. Vanderpoel and Thomas G. Shearman, for respondents.

ANDREWS, Ch. J. By section 15, of the article of the Revised Statutes relating to the creation and division of estates in land (1 R. S. 723), the absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of two lives, in being at the creation of the estate, except in a single case not material to the present inquiry. What shall constitute such suspension is declared in section 14. Such power of alienation (the section declares) is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. The rule declared in this section constitutes, under our statute, the sole test of an unlawful perpetuity. Construing sections 14 and 15, together, it is manifest, that where there are persons in being at the creation of an estate, capable of conveying an immediate and absolute fee in possession, there is no suspension of the power of alienation, and no question under the statute of perpetuities arises. But the statute does not prohibit all limitations of estates, suspending the power of alienation. It permits them, within the restriction of two designated lives in being at their creation, and a minority. If the suspension of alienation is effected by the creation of future contingent estates, the validity of the limitation depends upon the question, whether the contingency upon which the estates depend, must happen within the prescribed period. If the suspension is effected by the creation of an express trust to receive the rents and profits of land, under section 55 of the statute of uses and trusts (1 R. S. 728), the lawfulness of the suspension depends upon the question, whether the trust term is, in respect of duration, lawfully constituted. But the mere creation of a trust does not, *ipso facto*, suspend the power of alienation. It is only suspended by such a trust, where a trust-term is created, either expressly or by implication, during the existence of which a sale, by the trustee, would be in contravention of the

trust. Where the trustee is empowered to sell the land, without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed by the non-action of the trustee, or, in consequence of a discretion reposed in him, by the creator of the trust. The statute of perpetuities is pointed only to the suspension of the *power* of alienation, and not at all to the time of its actual exercise, and when a trust for sale and distribution is made, without restriction as to time, and the trustees are empowered to receive the rents and profits, pending the sale for the benefit of beneficiaries, the fact that the interest of the beneficiaries is inalienable by statute, during the existence of the trust, does not suspend the power of alienation, for the reason that the trustees are persons in being who can, at any time, convey an absolute fee in possession. The only question which, in such a case, can arise under the statute of perpetuities, is, whether the trusts in respect to the converted fund are legal, or operate to suspend the absolute ownership of the fund, beyond the period allowed by law. If the limitation of the interests in the proceeds is illegal, the consequence might follow that the power of sale, given to accomplish the illegal purposes, would be void. (*Van Vechten v. Van Veghten*, 8 Paige, 124.)

It is strenuously insisted by the counsel for the respondent, that the testator intended the will in question to vest the legal title to his residuary real estate in the executors, and that this is the legal effect of the power of sale conferred by the fourth section, in connection with the clause in the eighth section, whereby he directs his executors to divide all the "rents, income or profits from any estate until it is finally distributed semi-annually among those to whom the bequests are made, in the proportion that the amount of the said bequest bears to the said net income or profit." There is no express devise to the executors of the legal estate; but the direction that they shall semi-annually divide the net income and profits, until the final distribution among the several distributees, carries with it, by natural implication, an authority to receive the rents, income and profits meanwhile, to enable the executors to perform the duty of dividing them among the several beneficiaries.

The testator contemplated that the real estate might not be sold for some time after his death, for by the first clause in the eighth section, he authorizes the executors, "in view of the present great depression in real estate," to postpone the sale in their discretion, but for a period not longer than three years after his decease. The presence of the legal estate in the trustees pending a sale, if not absolutely necessary to enable them to perform the duty imposed upon them, to divide the net income and profits, is a convenient and natural agreement, and the vesting of the legal estate in the trustees by implication, would not, as we construe the will, defeat or disturb any of its provisions, but would be in harmony with its scheme and dispositions. The general rule that, to constitute a devise of an estate by implication, the intention must be clear, is well settled. (Jarman on Wills, 465.) The rule has especial application, and is most stringently applied, where a beneficial devise by implication is claimed, which would divest the title of the heir if the claim should be admitted. This rule has also been frequently applied in cases involving questions under our statute of uses and trusts, where a trust estate, if held to result from the language and dispositions of a will, would render it illegal and void. In such cases the courts, for the purpose of sustaining the will, construe an authority and duty conferred or implied upon executors, where it is possible to do so, as a mere power in the trust, although the duty imposed, or the authority conferred, may require that the executors shall have control, possession, and actual management of the estate. (*Downing v. Marshall*, 23 N. Y. 366; *Post v. Hover*, 33 Id. 593; *Tucker v. Tucker*, 5 Id. 408.) But there are many authorities tending to sustain the proposition, that a trust will be implied in executors, when the duties imposed are active, and render the possession of the legal estate in the executors, convenient and reasonably necessary, although it may not be absolutely essential to accomplish the purposes of the will, and when such implication would not defeat, but would sustain, the dispositions of the will. (*Craig v. Craig*, 3 Barb. Ch. 76; *Bradley v. Amidon*, 10 Paige, 235; *Tobias v. Ketchum*, 32 N. Y. 329; *Vernon v.*

Vernon, 53 Id. 351; *Morse v. Morse*, 85 Id. 53. See, also, *Brewster v. Striker*, 2 Id. 19.)

But it is unnecessary to determine whether the executors took, under the will in question, the legal title to the real estate, for in the view we take of the will, there was no suspension of the power of alienation, whether the executors took a trust estate or were simply donees of a trust power. In either character, whether as trustees or as executors only, they could at any time from the moment of the testator's death, have conveyed an absolute fee in possession. The suspension of the power of alienation of the real estate is supposed to result from the direction of the fourth section of the will, that the sale of the testator's real estate, situate in the State of New York, should be made by the executors at public sale in the city of New York, after three weeks' notice by publication in four daily newspapers of the city, and also from the provision in the eighth section that, "in view of the present great depression in real estate," the executors might exercise a discretion as to the time of sale, not longer than three years after the testator's death. The direction that the real estate in this State should be sold at public sale, on three weeks' notice, was a prudential arrangement to insure a fair sale, and prevent a sacrifice of the property, and in no proper sense suspended the power of alienation. The direction for notice was a mere incident to the conversion of the property, and the requirement was both usual and reasonable. The statute of perpetuities is not violated by directions which may involve some delay in the actual conversion or division of property, arising from the necessity of giving notice, or doing other preliminary acts. (*Manice v. Manice*, 43 N. Y. 303.) Such delays are not within the reason or policy of the statute. The statute was aimed against the creation of inalienable trust estates, or contingent limitations, postponing the vesting of titles beyond the prescribed period. The act of 1837 (chap. 460, § 43), provides that sales of real estate made by executors in pursuance of an authority given by any last will, unless otherwise directed therein, may be public or private. A public sale implies prior notice. The direction that the sale should be public was clearly

valid, and it can make no difference upon the point now in question, whether the length of the notice (if reasonable) is prescribed by the testator or is left to the judgment of the executors.

We are also of the opinion, that the discretion vested in the executors, to delay the sale of the real estate not exceeding three years, did not create a trust term for any period of time, and involved no suspension of the power of alienation. The discretion, as the testator declares, was given in view of the depression in real estate. In the absence of any provision in the will, the executors would have a reasonable discretion as to the time of sale, to be exercised in view of all the circumstances. The *power* of sale was not fettered by the discretion given by the will. The executors could sell and convey the land at any time, by a perfect title. It may be conceded that they were bound to exercise their discretion in good faith, and to delay the sale if the interests of the beneficiaries seemed to require it. But there can be no unlawful perpetuity unless the *power* of sale is suspended, and the mere fact that it might be the duty of the executors, in the exercise of their discretion, to postpone the sale to await a more favorable market, does not, we think, constitute such a restraint as suspends the power of alienation within the statute.

The remaining question on this branch of the case relates to the limitation of interests in the proceeds of the sale to be made by the executors. There was, by the will, an absolute conversion of the real estate into personalty, as of the time of the testator's death, and the several distributees took their interests as money and not as land. (*Kane v. Gott*, 24 Wend. 641; *Stagg v. Jackson*, 1 N. Y. 206.) Were these interests so limited as to vest the absolute ownership within or at the expiration of not more than two lives in being at the death of the testator? (1 R. S. 773.) The executors, in the fourth section of the will, are directed, after selling the real and personal property, and deducting expenses and charges and \$30,000 for the testator's wife, to divide the remainder into fifty equal parts, "and if my son Christopher R. Robert, junior, be then surviving, to pay over to him twelve equal parts thereof, but,

in case of his death prior to such distribution, upon such distribution to pay over the said twelve parts to his lawful issue in equal portions, share and share alike." The testator, in similar language, gives to his son Frederick, eleven shares, to his son Howell, twelve shares, and to his daughter Jane R. Corning, five shares, and the executors are directed, on the division, to pay the remaining ten shares to "the trustees of Robert College of Constantinople." We are of opinion that the legacies to the sons and daughter of the testator, and to Robert College, vested in the respective legatees immediately on the death of the testator. It is true that there is in the fifth section of the will, no gift to the several legatees, except the gift implied in the direction to the executors upon the distribution, to pay over the shares respectively, and by a general rule of construction, where there is no direct gift, and words of condition such as *if* or *upon* are used, in connection with a direction for payment at a future time, the time is regarded as of the substance of a gift, and the legacy is contingent and not vested. But the question is generally one of intention, and the whole will is to be considered in determining the intention of the testator. The intention of the testator in respect to the shares of the sons and daughter, appears to have been to give them the absolute title to their respective shares, subject to a limitation over to their issue, in case of their death before the period of distribution. The postponement of the distribution, which was contemplated, was for the convenience of the estate, to enable the executors advantageously to convert the property; and the rents, income and profits, which might accrue between the time of the testator's death and the time of distribution, were given to the several legatees to be paid, semi-annually, in proportion to their interests in the *corpus* of the fund. These circumstances are regarded as rebutting the presumption against the vesting of legacies, arising from the fact that there is no direct gift, but only a direction to pay over at a future time. The postponement of the payment, where it is made for the convenience of the estate, is consistent with the vesting of the legacies, and the gift of the intermediate income, indicates an intention to

vest the *corpus* from which the income is to be derived. (*Packham v. Gregory*, 4 Hare, 396; *Hanson v. Graham*, 6 Ves. 239; *Davies v. Fisher*, 5 Beav. 201; 1 Jar. 843; 1 Rop. on Leg. 573; 2 Wms. on Exrs. 1243.) It is also to be observed, that in the fifth section of the will, which provides for the contingency of the death of a child without issue, before the death of the testator, the testator designates the interest which is to go to the survivors, as "the share or proportion of my estate hereby given to the one so dying." The limitation over to the issue of any child dying before the distribution, was the limitation of a future contingent estate to such issue, but the ultimate vesting of the several legacies given primarily to the sons and daughter, could in no event be postponed longer than the life of the parent. On the death of any son or daughter before distribution, leaving issue, the share of the one so dying would immediately vest in such issue, and if there was no issue, it would go to his or her next of kin. (See *Norris v. Beye*, 13 N. Y. 273; *Trustees, etc. v. Kellogg*, 16 Id. 83.) The legacy to Robert College was also vested, and we perceive no ground upon which its validity can be questioned. It is not claimed that the corporation was not capable of taking the legacy, and the fact that the testator restricted the college to the use of the income was consistent with the purpose of donations to such corporations, and did not create a perpetuity. (*Wetmore v. Parker*, 52 N. Y. 450.) The provision that if the college should be discontinued, the trustees should apply the fund for purposes of Evangelical and Protestant education among the nationalities of the Turkish empire, if held to be void as a limitation over for the benefit of unascertained beneficiaries, or for other reason, would simply result in confirming an absolute title to the fund in the corporation.

We think the sixth section of the will is valid, within the rule that a testator may direct that the amount of a legacy once completely fixed by the will itself, shall be diminished by events actually occurring as matters of fact, but not by an unattested testamentary writing, disconnected from any actual occurrence. (*Langdon v. Astor*, 16 N. Y. 26.) The sixth section was, we think, intended to provide, simply, that any actual

indebtedness found charged concurrently therewith on the testator's books of account, should go in diminution of the payments to the several legatees as a part of their shares respectively.

These views lead to an affirmance of the judgment.

All concur, except TRACY, J., absent.

Judgment affirmed.

NUGENT *vs.* LADUKE.

[87 Indiana, 482.]

PLEDGE BY EXECUTOR OF ESTATE-SECURITIES FOR INDIVIDUAL DEBT.

An executor or other trustee has no authority to pledge or otherwise use for his individual benefit assets of the estate, and one who takes them from him with notice acquires no rights in equity.

FROM the Clark Circuit Court.

J. K. Marsh, for appellants.

J. H. Stotsenburg, for appellees.

BLACK, C. The appellees, Sarah L. Laduke and Edwin Laduke, her husband, sued the appellants, George W. Nugent and David S. Koons.

The complaint alleged that, on the 7th of March, 1873, said George W. Nugent executed to one Mary T. Nugent a mortgage on certain land in Clark county, to secure her in the payment of a note for \$3,500, with interest at the rate of seven and one-half per cent. per annum, payable ten years after date, the interest to be paid annually; and in case of the death of said Mary prior to the expiration of ten years from said date, then said debt was to become due and payable one year after her death. The recording of the mortgage was alleged; and

it was stated that afterward said Mary T. Nugent died testate at said county, and said David S. Koons became the executor of her last will; that after more than one year had elapsed from the date of said Mary's death, said Koons, on the 20th of March, 1876, being then and there indebted to the appellee, Sarah L. Laduke, in the sum of \$550, then assigned, transferred, indorsed, and delivered said note and mortgage to said Sarah. It was alleged that copies of said note and mortgage and said assignment were filed with the complaint, marked respectively "A," "B," and "C"; that said note was due and wholly unpaid, except as to certain credits stated. Prayer for judgment against said George W. Nugent for \$2,500, the foreclosure of said mortgage and the sale of said mortgaged premises, or so much thereof as might be necessary, the interest of said Koons therein, and all proper relief.

Exhibit "A" was a copy of a note of George W. Nugent to Mary T. Nugent or order, for \$3,500, corresponding with the note described in the complaint. The exhibit also set forth copies of the indorsements on said note, which were as follows:

"Received, March 7th, 1874, two hundred and sixty-two dollars and fifty cents, interest on the within note for one year." This was signed by Mary T. Nugent.

"Sept. 11th, 1876, received on the within note three hundred and thirty-four and $\frac{1}{100}$ dollars, being the amount of interest up to June 16th, 1875. D. S. Koons, Ex'r."

"Received on the within note nine hundred and twenty-one and $\frac{1}{100}$ dollars. D. S. Koons, Ex'r."

Exhibit "B" consisted of copies of a note and of an assignment indorsed thereon. The note was the individual note of D. S. Koons, for \$550, dated December 4th, 1876, payable three months after date, to the order of Sarah L. Laduke, bearing ten per cent. interest until paid. The assignment indorsed thereon was as follows: "Given as collateral security, to secure the payment of the within note, one note on G. W. Nugent for thirty-five hundred dollars, with a credit of \$921 70 on said note, drawn in favor of Mary T. Nugent, and came into possession of D. S. Koons by will of Mary T. Nugent. This note

to be held by Sarah L. Laduke, to secure the payment of this note. D. S. Koons."

The payment of one year's interest was also indorsed on said note of Koons.

Exhibit "C" was a copy of a mortgage on certain land in Clark county, executed March 7th, 1873, by George W. Nugent to Mary T. Nugent, to secure two notes made by the mortgagor to the mortgagee, one being for \$500, due July 1st, 1873, and the other being the note described in the complaint.

Each of the defendants filed answers of general denial and paragraphs of special defense, and the plaintiffs replied. The cause was tried by the court. The finding was for the plaintiffs, that the allegations of the complaint were true; that the indebtedness of Koons for which the collateral security was given amounted to \$711 05; that there was due the plaintiff from defendant Nugent, by reason of said note and mortgage, \$527 40; and that the mortgage ought to be foreclosed. Accordingly, judgment was rendered that the plaintiff Sarah L. Laduke recover of the defendant George W. Nugent said sum of \$527 40 and costs, and, in default of payment, that the mortgaged property be sold, etc.; and the surplus be paid to Nugent, and that the net proceeds of the judgment be credited on the indebtedness of Koons to said Sarah.

The defendants, and each of them, moved for a new trial, for the reasons that the finding was contrary to law and contrary to the evidence, and that the amount of the recovery was too large. The motion was overruled. The first two specifications in the assignment of errors relate to rulings as to which appellants took no exceptions in the court below, and, therefore, they cannot be noticed. The other assignments are, that the court erred in overruling a motion for a new trial, and that the complaint does not state facts sufficient to constitute a case of action against the appellants, or either of them.

Assuming that an executor has, in this State, power to sell or pledge a promissory note, the legal title to which was in his testator, as to which see *Thomas v. Reister*, 3 Ind. 369; *Speelman v. Culbertson*, 15 Ind. 441; *Hamrick v. Craven*, 39

Ind. 241; *Weyer v. Second Nat'l Bank*, 57 Ind. 198; the right to do so depends upon the circumstances of the transaction. (*Krutz v. Stewart*, 76 Ind. 9.) In *Chandler v. Schoonover*, 14 Ind. 324, it was said that an administrator has no power to apply the proceeds of the sale of his intestate's property to discharge his own individual liabilities, because the exercise of such a power would be inconsistent with his prescribed duties as administrator, and against public policy, and that in the instance then under consideration the creditor, whose claim against the administrator it was thus sought to pay, was without excuse, because the facts showed that he must have known that the administrator was acting in violation of his trust. (See, also, *Austin v. Willson's Ex'rs*, 21 Ind. 252.)

One who knowingly receives from a trustee the trust money or property in satisfaction of the individual debt of the trustee to him, must be regarded as participating in the fraudulent diversion of the property. (*Wallace v. Brown*, 41 Ind. 436; *Fleece v. Jones*, 71 Ind. 340; *Rogers v. Zook*, 86 Ind. 237.)

If one to whom an administrator assigns a promissory note for the personal benefit of the latter, have knowledge, even from the nature of the transaction, that the administrator is acting in violation of his trust, the right of property in the note is not divested. (*Thomasson v. Brown*, 43 Ind. 203, and authorities cited.)

Where a note, which is property of a decedent's estate, has been thus assigned by the executor, in violation of his trust, to one chargeable with knowledge of the wrong, such assignee cannot recover on the note in an action against the maker. (*Krutz v. Stewart*, *supra*.)

In *Williams on Executors*, 1004, 6th Am. ed. (bottom p. 938), it is said that in equity it is established that, "generally speaking, the executor or administrator can make no valid sale or pledge of the assets as a security for, or in payment of, his own debt; on the principle that the transaction itself gives the purchaser or mortgagee notice of the misapplication, and necessarily involves his participation in the breach of duty;" and the authorities are collected in a note.

It is further said, in the same connection, that "if the executor be also specific legatee, a sale or mortgage from him of the specific legacy for the satisfaction of his private debt will be safe, unless it can be shown that the purchaser or mortgagee knew there were debts unpaid."

The same be true if the executor be sole residuary legatee; but if he be joint residuary legatee his creditor cannot take any of the assets in payment of the executor's individual indebtedness; and he must not in such case rely upon the representations of the executor, but is bound to examine the will. (Perry's Trusts, sec. 811, and authorities.)

If circumstances appear sufficient to put the purchaser or pledgee on his guard, or on inquiry, he will be regarded in equity as participating in the misapplication of the assets. This will be so if it appear to him in any way, either from words upon the face of the securities or by any other form of notice, either actual or constructive, that there is such a misapplication. (Perry's Trusts, secs. 225, 814.)

The use of the word "trustee," in the assignment of a mortgage and note, has been held to import the existence of a trust and to give notice thereof to all into whose hands the instrument may come. (*Sturtevant v. Jaques*, 14 Allen, 523.) So, when a certificate of stock was issued to a person as "trustee," and it was indorsed in blank by him as "trustee," this was notice to a person taking it as a pledge for private indebtedness. (*Shaw v. Spencer*, 100 Mass. 382; 1 Am. R. 115.)

By her will, which was introduced in evidence, Mrs. Nugent directed that Koons, one of whose family she said she had become, should, as compensation, have, during her lifetime, the interest, as it accrued, on said note for \$3,500, and, in addition to such interest as might accrue in her lifetime, she gave him "the further sum of \$500, said legacy of \$500 to be the first legacy paid out of my estate." She bequeathed \$500 to Sarah A. Koons, and whatever remained out of her estate, after payment of her debts and funeral expenses, and expenses of administration, she gave to her six daughters, to be equally divided between them; and she appointed said Koons executor of her will.

The evidence showed that Koons qualified as executor, and, at the time of the trial, was still acting as such ; that no claims had been filed in the clerk's office against the estate ; and that Koons had made no report as executor. Various payments upon the Nugent note, received by Koons after the assignment to the plaintiffs, were proved.

It was proved that the Nugent note came into the hands of Koons as executor, and that the note of Koons to Mrs. Laduke, to secure which the Nugent note and mortgage were pledged, was given for the individual debt of Koons, for money borrowed to pay on his house. Mrs. Laduke testified that she did not know that the Nugent note belonged to the estate ; that Koons said he came by the note by the will ; that it was coming to him ; that it was his ; and that she supposed it was his. Her husband testified that Koons said that all the Nugent note was his by will, except the credits. Koons testified that he transacted all the business in reference to the loan with Mr. Laduke, and not with Mrs. Laduke, and that he told Mr. Laduke, that he came in possession of the Nugent note by the will of Mrs. Nugent.

While the evidence did not show that any debts had been paid, it showed that no claims had been filed ; but it showed that the executor was not a specific legatee or a residuary legatee, and that the amount of his general legacy was less than his private debt for which he pledged assets.

It appeared from the complaint that the note of George W. Nugent, secured by mortgage, was payable to Mary T. Nugent, or order. It was not alleged that it had been assigned to Koons, and that exhibit did not show an assignment by Mrs. Nugent. It was alleged that she died testate, and that Koons became executor of her will. The will was not set out. No title to or right in said note and mortgage was shown to be in Koons save what he acquired as executor. The indebtedness for which he was shown to have pledged the note and mortgage was stated as his private indebtedness, evidenced by his individual note. The assignment by way of pledge was made by Koons in his individual capacity. Upon the note assigned,

as shown by the exhibit, were three credits, the first signed by Mrs. Nugent, the other two by Koons, as executor.

In his assignment written upon the back of his individual note, he referred to one of these payments made to him as executor, which he had no other right to receive, and which had been receipted for on the Nugent note by him as executor, and said that the assigned note came into his possession by will of Mary T. Nugent.

If the complaint, by its averments, does not clearly and directly show that Koons received the note and mortgage as executor, it does not show that he received them otherwise than as executor. We think it does appear by the complaint, though somewhat obscurely, yet sufficiently, that Koons held the note and mortgage as executor, and that Mrs. Laduke was put upon inquiry. The will would have shown that Koons had no power to pledge the Nugent note and mortgage to secure his private debt, even to the amount of \$500. Mrs. Laduke could not be protected by her belief of the executor's representations, in contradiction, as well of his own written admissions brought to her knowledge, as of what she might have learned by diligent inquiry. Where the rights of others interested in the settlement of a decedent's estate are so involved, to permit such dealings would be contrary to the policy uniformly enforced in the administration of trusts.

While the complaint showed that the debt for which the property was pledged was the private debt of the executor, that the property pledged was property of the decedent's estate, and that the pledgee knew that such was the character of the debt, and was put upon inquiry as to the character in which the pledgor held the property, it did not attempt in any manner to show facts which, under such circumstances, were necessary in order to authorize the pledging, and the evidence, which we have set out for illustration, showed why such attempt was not made.

We think that the complaint did not show a cause of action, and that the judgment should be reversed.

SISTRUNK vs. WARE.

• [69 Alabama, 273.]

WHEN LEGACY A CHARGE ON REAL ESTATE DEVISED.

The intention of testator must govern in determining whether legacies are charged on land devised.

Whenever it appears that the devise was given on condition or in consideration that the devisee should pay the legacy, the land will be charged with its payment.

BILL to charge legacy on land devised. Defendants interposed a demurrer which was sustained by the Chancellor, and bill dismissed.

D. S. Troy and H. C. Tompkins, for appellant.

Arrington & Morrisette, Watts & Sons, and R. M. Williamson, opposed.

BRICKELL, C. J. Robert J. Ware died, having made and published his last will, which was subsequently admitted to probate. By the second item of the will, he devises and bequeaths to his wife Asenath A., for the term of her natural life, a plantation containing four or five thousand acres of land, and all the personal property thereon situate. By the third item, he devises and bequeaths to her absolutely his dwelling-house, situate in the city of Montgomery, with all the household and kitchen furniture, and household appliances thereunto belonging, or which were there at the time of his death, with the carriages and horses she was then accustomed to use. The fourth item is in these words: "It is my will and desire, and I do hereby give and devise all my moneys and choses in action, that I may have at the time of my death, unto my said wife, Asenath A. Ware, to have and to hold to her, subject to the following conditions, that is to say, if demands which the law requires to be paid, shall come against my estate, to the amount of ten thousand dollars, or less, my said wife shall settle and pay said demands, not exceeding ten thousand dollars, and shall

also pay to my grand-daughter, Kate Molton Ware, daughter of Robert Y. Ware, the sum of five thousand dollars, payable at such time as my said wife may deem proper, without interest. If, however, more than ten thousand dollars shall come against my said estate, in debts to be paid to creditors, that it is my will that the balance over and above the sum of ten thousand dollars to be paid as above, by my said wife, shall be borne and paid equally by her and my three children, hereinafter named, in equal proportions." The eighth item of the will is in these words: "I will and bequeath five thousand dollars to my grand-daughter, Kate Molton Ware, which five thousand dollars shall be paid to her by my said wife, as is above provided in this will." Kate Molton having intermarried with the appellant, on the 23d day of November, 1872, Mrs. Ware made her promissory note payable at one day to said Kate M., for the said five thousand dollars, as expressed in the note, "the amount required by the will of R. J. Ware, deceased, to be paid to her by me." It is further expressed that "this note is not to have the effect of discharging any property given to me by said will, from any liability or lien existing by operation of law for the payment of said legacy." The purpose of this bill is to charge the real estate devised to Mrs. Ware with the payment of the said legacy of five thousand dollars, upon averments of her insolvency, and that the personal property bequeathed her has been consumed and otherwise appropriated.

If real estate is devised upon condition to pay a legacy, or with a direction that the devisee pay the legacy in respect to the estate so devised him, and because the real estate has thus been devised, such real estate is in equity chargeable with the payment of the legacy, unless there is something in the will to rebut the legal presumption; or from which it can be inferred that the testator intended to exempt the estate devised from that charge. (*Harris v. Fly*, 7 Paige, 421; Willard's Eq. 489.) The rule is thus stated: "If legacies be given, and at the same time directed to be paid out of the real property; or where the real estate is given to A., either *in presenti* or *in futuro*, he paying out of it certain legacies; or if the land be charged

with such payments; in each case, the devised estate will be the only fund out of which those sums are to be paid. The reasons are these: the estate in the one case is expressly incumbered, and in the other, it is intended to be divided between the devisee and legatees. In the last instance, the estate is given upon condition that the devisee make the specific payments. He takes the land *cum onere*, and *non constat* the estate would have been devised to him, unless the testator had conceived that the legacies would have been discharged out of it." (1 Roper's Leg. 670.)

In reference to the application of this rule, as in reference to all other questions arising in the construction of wills, the intention of the testator must govern. The intention to charge the real estate may be expressed, or the charge may be created by fair and just implication. Whenever it appears satisfactorily that the devise was given on condition, or on the consideration that the devisee should pay the legacy, the land will be charged. The charge cannot be implied, when it appears that the testator intended the legacy should be paid by the devisee from other gifts made to him, though such gifts from any cause may be insufficient for the payment, or may become insufficient from the default of the devisee.

The devises of the real estate to Mrs. Ware are specific, distinct from, and independent of the bequests to her of the moneys and choses in action. They contain no words of charge, nor any expression akin to those from which, in decided cases, a charge has been implied. The legacy of five thousand dollars to Kate Molton Ware, is introduced into and connected with the bequest of the moneys and choses in action, and forms part of the directions as to the payments Mrs. Ware is required to make from that bequest. The devises of the real estate are unconditional—the bequest of the moneys and choses in action is upon terms and conditions—the payment of the debts of the testator to the amount of ten thousand dollars, and of the legacy of five thousand dollars to Kate Molton Ware. The testator appoints the fund which is charged with the payment of the legacy, and it is with respect to that fund the devisee is required to pay the legacy, and not with respect to the real

estate. If the direction had been that the legacy should be paid because of the real estate devised for life, it would not be insisted, the real estate devised in fee simple was charged with the payment of the legacy. (2 Lomax's Ex. 171.) The same reasoning which would confine the charge of the legacy to the particular real estate in the case supposed, confines it, under the terms of this will, to the gift of the moneys and choses in action. By the acceptance of the gift of the moneys and choses in action, Mrs. Ware may have become personally liable for the payment of the legacy. To fasten upon her such liability, is not a purpose of the bill as now framed; and it is apparent that question was not presented to the chancellor.

We find no error in the record, and the decree must be affirmed.

SHEETZ'S APPEAL.

[100 Penn. St. 197.]

COSTS OF EXECUTOR.—ATTEMPT TO ESTABLISH FORGED WILL.

The right of an executor to costs in an issue *devisavit vel non*, even when successful, depends on the question whether the litigation is for the benefit of those entitled to the estate.

An executor will not be allowed out of the estate the costs of proceedings taken by him to establish a forged will.

APPEAL from the Orphans' Court of Philadelphia.

The facts sufficiently appear in the opinion.

Rudolph M. Schick and *Benjamin H. Brewster*, for appellant.

C. S. Pancoast and *John G. Johnson*, for appellees.

STERRETT, J. After a protracted and vigorously conducted contest, the paper writing purporting to be the last will and testament of Robert Whitaker, deceased, was decided to be a

forgery, and letters testamentary were granted to the executors of the genuine will. The forged will was produced for probate by W. R. Dickerson, Esq., who had been the friend and legal adviser of the deceased. A caveat was filed, and after an amount of testimony had been taken, an issue was directed to determine the validity of the alleged will. When the issue came on for trial in the Court of Common Pleas, No. 1, an agreement was made between the parties thereto, in pursuance of which a verdict against the will was taken, and the sum of \$15,000 was paid to appellant for his expenses, including counsel fees. A petition was afterwards presented by Mary E. Service, a legatee, in behalf of herself and others, and also by W. R. Dickerson, Esq., in his own behalf, praying the court to set aside the verdict. This was done, and the second trial resulted as before, in a verdict for defendants, finding substantially that the Dickerson will was a forgery. Subsequently appellant presented to the Orphans' Court a claim against the estate for expenses of the second trial, viz., \$927, witness fees, and a reasonable allowance for counsel fees, neither of which were allowed. The subject of complaint in the several specifications of error is the rejection of this claim.

It may be conceded that appellant, in endeavoring to establish the validity of the disputed paper, acted in good faith, believing it was the genuine will of Mr. Whitaker; but purity of motive and goodness of intention alone will not justify the allowance of such a claim as that made in this case. While the general and almost universal rule is that the defeated party is not entitled to costs, an exceptional case is sometimes presented in which it may be proper for a chancellor to make a reasonable allowance for counsel fees and expenses of the losing party, on the ground that it is a charge which in equity and good conscience the fund ought to bear; but, as remarked by the learned judge of the Orphans' Court, it would be an extraordinary perversion of this doctrine to apply it to one claiming adversely to the will of a testator, and seeking, through the instrumentality of a forged document, to defeat its operation. The allowance of costs in *Geddis' Appeal*, 9 Watts, 284, to a disinterested executor, who in an issue *devisavit vel non* unsuccessfully de-

fended a will which had been admitted to probate, and under which he was acting, rests on the peculiar circumstances of that case. They differ so widely from those of the present case that the principle on which the former rests is inapplicable to the latter. The ruling in *Royer's Appeal*, 1 Harris, 568, that it is the duty of an executor to sustain the will, is qualified by saying, "that under our decisions, his right to do so depends altogether upon whether the litigation is for the benefit of the estate or in promotion of the interest of those eventually entitled to the fund." And the learned judge who delivered the opinion in that case adds: "It is, therefore, difficult to imagine how, where a pretended will has been repudiated by verdict, the costs of the contest can be cast on those who have succeeded." In *Scott's Estate*, 9 W. & S. 98, the executor prosecuted the litigation to a successful issue, not for his own benefit, but in the interest of the legatees, who thereby obtained the whole estate. It was there held that he was entitled to credit fees paid counsel for their professional services in establishing the validity of the will and the bequests therein contained. If he had been unsuccessful, his claim to be paid out of the funds of the estate would have rested on different and wholly untenable grounds.

Whatever may be the rule in other States it is sufficient to say that in Pennsylvania the right of an executor to costs in an issue *devisavit vel non*, even when successful, depends on the question whether the litigation is for the benefit of those entitled to the estate. In no possible view was the effort of appellant to establish the forged will of any benefit to the widow and legatees of the testator in this case; on the contrary, it was fraught with nothing but peril and expense to them.

The question before the Orphans' Court was rightly decided in accordance with the principles recognized in the cases above cited; to which may be added *Mumper's Appeal*, 3 W. & S. 441, and *Rankin's Appeal*, 10 W. N. C. 235.

Decree affirmed at the costs of appellant, and appeal dismissed.

BRADISH vs. McCLELLAN.

[100 Penn. St. 807.]

CODICIL DIRECTING WHICH OF TWO PRIOR WILLS SHOULD TAKE EFFECT.

Testator executed, at different times, two wills, and later a writing styled a "codicil," in which he directed that if he died within three months the first testament should be his last will, and upon his decease after such time the last writing should take effect. Testator died within the three months. *Held*, that the first will took effect and the codicil must be construed as a codicil thereto.

ERROR to the Court of Common Pleas of Cumberland county.

In ejectment.

Both parties claim under James Hamilton, who resided at Carlisle, and who died there testate, January 23d, 1873. He was possessed of a large estate, consisting of real and personal property, and on the 20th day of November, 1871, he executed a writing purporting to be his last will and testament and marked "A" by him. On the 13th day of January, 1873, he executed another writing of similar import, which he marked "B." In and by virtue of both, he made disposition of his entire estate, *inter alia*, by bequests and devises to charitable and religious uses. By both, the plaintiff was made residuary devisee, which *residuum* included the land in dispute. On the — day of January, 1873, Mr. Hamilton executed another paper, which he styled "codicil to my last will and testament." It contained bequests and devises to certain persons, not named in either of the former writings, and *inter alia*, as follows:

"2. I give and devise to Miss Virginia McClellan, the six-acre field on the Carlisle Springs Road, North Middleton township, Cumberland county, about half mile north of Carlisle, to her and her heirs in fee simple." This is the land in dispute in this suit.

The sixth item of the codicil is in the following words:

"6. Whereas, There is an act of Assembly rendering void all eleemosynary bequests and devises, if not executed in a cer-

tain number of days before the decease of the testator: And whereas, I executed a will dated the twentieth day of November, A. D. 1871, Now I, James Hamilton, the testator, declare said will of '20th of November, 1871, marked 'A,' to be my last will and testament, should I die before the first of March, 1873, otherwise the will of the 13th of January, 1873, shall be, and is hereby declared to be, my last will. Witness my hand and seal this — day of January, 1873.

“JAMES HAMILTON.”

This codicil was written on a separate piece of paper. It and the two wills were connected together after his decease, and all the three were admitted to probate, January 29th, 1873, by the register of wills in and for the county of Cumberland, as the last will and testament of James Hamilton. In the case of *Bradish's Appeal*, 24 Smith, 69, the writing of November 20th, 1871, was held to be his last will, and the controversy now is whether the codicil is a supplement to it, or to the writing of January 13th, 1873.

Both wills and the codicil are in the handwriting of the testator; the wills only are witnessed, but there are no subscribing witnesses to the codicil.

John Hays and Stuart & Stuart, for plaintiff in error.

S. Hepburn, Jr., for defendant in error.

MERCUR, J. This contention relates to the will of James Hamilton, who died January 23d, 1873. On November 20th, 1871, he executed a writing purporting to be his last will and testament. On January 13th, 1873, he executed another of similar import, in which he made a charitable bequest differing from one in the first will. On the — day of January, 1873, he executed a third writing purporting to be a “Codicil to my last will and testament.” It was not written on the same piece of paper on which either of the former was written, nor was it attached thereto. It gave bequests and devises to persons not named in either of the former writings, and, *inter alia*, devised the land in question to the defendant. It pro-

ceeded to recite and declare, "whereas, There is an act of Assembly rendering void all eleemosynary bequests and devises, if not executed in a certain number of days before the decease of the testator: And whereas, I executed a will dated November the 20th, 1871, Now, I, James Hamilton, the testator, declare said will of November 20th, 1871, marked A, to be my last will and testament, should I die before the 1st of March, 1873, otherwise the will of the 13th of January, 1873, shall be, and is hereby declared to be, my last will."

After the death of the testator the three writings were connected together, and all of them admitted to probate. As he died before the first of March the writing of January 13th did not take effect as a will. (*Bradish's Appeal*, 24 P. F. Smith, 69.) The question now is, did the codicil become inoperative and fall with that writing or did it become a supplement to the will of November 20th, 1871? Although a subsequent will without a revoking clause will repeal a prior will, yet it does not preclude a testator by appropriate writing from reinstating the prior one. A codicil may revoke by implication the posterior of two wills, by expressly referring to, and recognizing the prior one as the actually subsisting will of the testator. (1 Jarman, *189.) Here the codicil does not stop with an implication. With both wills in his mind, he refers to each distinctly, and in unmistakable language the testator declares, in a certain contingency, the earlier one to be his last will and testament. That contingency occurred.

When the testator executed the codicil, he was uncertain which of the former writings would take effect as his will. It depended on the contingency of his dying before the time specified. There, however, was no contingency stated in regard to the codicil. There was no intimation that it should not take effect in either case. The clear intent was that it should have full effect and attach itself to whichever writing became operative as a will. The codicil was to become a part of that writing, and the two constitute the whole will. Any presumption that the codicil and the writing of January 13th were both executed at the same time, is clearly rebutted by the reference in the codicil to the latter as a writing then existing.

The conclusion to which we have come is not in conflict with the point decided in *Bradish's Appeal*, *supra*, properly understood. The main question there was whether effect should be given to the writing of November, 1871, in regard to charitable bequests therein. They were held to be valid. No person claiming under the codicil was a party to that issue. Hence the rights of the defendant were not there discussed nor decided. There is a *dictum* in the opinion, as to the intent of the codicil, to which we cannot agree. We cannot, therefore, hold that sufficient to defeat the title which we think the defendant so clearly took under the codicil, to the land in question. The learned judge correctly held that the plaintiff could not recover.

Judgment affirmed.

BOWERSOX'S APPEAL.

[100 Penn. St. 434.]

WHEN WIDOW ENTITLED TO ADMINISTRATION, ALTHOUGH ILLITERATE.

A widow's illiteracy, inability to write or to read printing unless in German, will not deprive her of her right to administer on her husband's estate where she possesses a good mind, and sound judgment, a knowledge of the values of property and of the practical business transactions of life. Poverty is not insolvency.

APPEAL from the Orphans' Court of Snyder county.

Appeal by Joseph and Samuel Bowersox, from a decree revoking letters of administration issued to them on the estate of John Bowersox, deceased, and directing the register to grant letters to deceased's widow.

The facts appear in the opinion.

T. J. Smith and *A. W. Potter*, for appellants.

Charles Hower, for appellee.

MERCUR, J. John Bowersox died intestate. The register granted letters of administration on his estate to the appellants, one of whom is a son, and the other a brother of the intestate. Susannah Bowersox, claiming to be the widow of the decedent, and the right to administer on his estate, appealed to the Orphans' Court. After hearing, the court vacated the letters issued to the appellants, and ordered that letters be issued to Susannah Bowersox.

Two objections are made to the conclusion of the court: one to finding her to be the widow of the decedent, the other to deciding that she was a proper person to be intrusted with the management of the estate. We have carefully examined the evidence. We think it amply sufficient to justify the court in finding that she had been married to John Bowersox. Not only was there positive evidence of the fact of their marriage: but they undoubtedly lived together for some twenty years; and the clear weight of evidence shows, as husband and wife during all that time. The apparent desire not to make the marriage generally known, is accounted for by the fact that all right to her former husband's property terminated when she ceased to be his widow.

The effort to prove her an improper person clearly failed. It is true she is rather illiterate. She cannot write. She cannot read printing unless it be in German. She has not a business education. In this respect she is like a large majority of the widows in the Commonwealth. The Act of Assembly giving the widow a preferred right to administer on the estate of her deceased husband has not made an imperfect or defective education a legal disqualification. A good mind and sound judgment, a knowledge of the values of property, and of the practical business transactions of life, are sufficient to satisfy the requirements of the statute. All these the appellee has. They will enable her to select competent assistants and able advisers. This will secure an efficient and faithful discharge of the trust.

It is further claimed, inasmuch as she has no separate property, that she comes within the prohibition declared in *Cornpross's Appeal*, 9 Casey, 537, by reason of insolvency. This

is a misapprehension of the meaning of insolvency. It is not the mere absence of property liable to seizure on execution. It is the owing of debts in excess of the value of his tangible property. If he owes no debt he is not insolvent, although he may have no such property. A young mechanic or laborer out of debt, just starting for himself with no property but his knowledge, brawny arm, and energetic will, is not insolvent. Nor is one without visible property, owing no debt, who has acquired a learned profession which he is about to follow. In all these cases each may by industry, labor, and economy, pay his way and contract no debts. Without debts there can be no insolvency. Poverty and insolvency are not synonymous terms.

The evidence in the present case does not show the appellee to owe a single dollar. If anything remain of her husband's estate after paying his debts, she will have property. That will be in addition to the undoubted security which she must give before the letters are issued to her.

Decree affirmed and appeal dismissed at the costs of the appellants.

SHARSWOOD, C. J., and TRUNKEY, J., dissent.

DONEGAN *vs.* WADE.

[70 Alabama, 501.]

CONDITION PROHIBITING CONTEST OF WILL.

Under a clause that if any one of testator's children should "resist the probate" of his will, or "petition to break or set it aside," his share shall go to the children who "shall not oppose" the will, a child who abets his sister in filing objections to the will and taking the preparatory steps to a trial, bearing the expense of her litigation and advising in its management, forfeits his share, although the opposition was abandoned before a trial.

APPEAL from Madison Chancery Court.

Bill for partition filed by William H. Donegan against

David Wade, Harriet Wade, and Amanda Wade, individually and as executrix of David Wade, Senior, deceased. Complainant claimed a one-third interest in the lands as purchaser at an execution sale upon a judgment against the defendant, David Wade.

David Wade, Senior, died in 1861, and by his will devised the land in question to four of his children, Amanda, Harriet and David, the defendants, and Robert, since deceased, to be equally divided between them, no interest being devised to Margaret Turner, a married daughter.

Amanda Wade and David Wade answered averring that the latter had forfeited all interest in the land by violating the provisions of the will against contests as set out in the opinion. David Wade specially averred. "When said will was presented for probate, in the Probate Court of Madison, respondent joined in the contestation thereof. Objections were filed to the probate of said will, certainly in the name of Margaret Turner, and also, as I believe, in the name of Robert Wade, both of whom were devisees under said will. Respondent aided, assisted and instigated the said Margaret Turner, in contesting the probate of said will; attended the courts while the contest was pending; directed the issuance of subpoenas for witnesses; gave Mrs. Turner \$100 to pay her lawyer, and told the lawyer that he would see him paid in full. On this state of facts, and according to the terms of the will, respondent forfeited the devise to him thereunder."

The will was offered for probate on June 13, 1861, by Amanda Wade, the executrix. On July 8, 1861, citations to the parties and subpoenas to the witnesses were ordered to issue, and the matter was adjourned, from term to term, till December 18, 1861, when contestants obtained leave to withdraw their objections, without prejudice, to filing a bill in chancery.

The following statement of the attorney for the proponents in the proceedings to probate the will was read, as well as a corroborative statement of the probate judge: "I know the fact that the probate of the will was resisted by Mrs. Turner, a daughter of said testator. In her name objections were filed to the probate of the will, averring the incompetency of the testa-

tor, and undue influences practiced on him by said Harriet and Amanda Wade. There were several continuances of the contest; witnesses were summoned, and depositions taken by each party. David Wade, a son of the testator, though not appearing on the record as a contestant, was active in the contest, seeking to defeat the probate of the will. He was present on several (if not all) the days set for the trial of the contest, advising and consulting with the lawyers engaged for the contestant."

The court below dismissed the bill.

Humes, Gordon & Sheffey and *D. D. Shelby*, for appellant.

L. P. Walker, opposed.

SOMERVILLE, J. The construction placed by the referee upon the will of David Wade was clearly correct. The 12th item of this instrument, which gives rise to this suit, is as follows: "It is my will, that if any one of my children shall *resist* the probate of my will, or *petition to break or set it aside*, such child or children shall not have any part of my estate whatever, and the portion intended for such child shall be distributed among those of my children mentioned in item No. 8, who *shall not oppose* my will, in the same way that the balance of my estate is therein directed to be distributed; the child or children *opposing my will* being excluded from any participation therein."

The question here presented is whether the conduct of David Wade, Jr., constituted such resistance or opposition to his father's will, as to work a forfeiture of his interests as devisee under the provisions of the above item. The testator possessed the right of disposing of his property as he saw fit, so long as he violated no law or established principle of sound public policy. He could bestow or withhold benefactions, as an attribute of the *jus disponendi*, without regard to considerations of justice, or of caprice. So, he could make some dispositions on conditions precedent or subsequent, not illegal. He chose to attach a ground of forfeiture, which would divest the interest

of any one of his children who might seek to resist or oppose his will. It is not denied that this is a legal or valid condition, when attached to a legacy or devise. Its purpose, too, is clear. It was designed to prevent the inauguration or prosecution of a suit or contest in the courts, commenced with the view of defeating the will of the testator as he had seen fit to make it. Such contests often breed irreconcilable family feuds, and lead to disgraceful family exposures. They not unfrequently, too, waste away vast estates, by protracted and extravagant litigation.

It is insisted by appellant's counsel, that, inasmuch as David Wade, Jr., has never contested the will of the testator in his own name, the forfeiture declared by the twelfth item cannot be enforced against him or against the appellant, who is his privy in estate. It cannot be denied (if we waive, for the present, all exceptions to evidence), that he aided and abetted his sister in the inauguration and prosecution of such a contest; that she opposed the will, so far as to file objections to its probate, and took all the initiatory steps preparatory to a trial of the issues on their merits; and that he was even bearing the expenses of the litigation, and advising in its management.

But it is argued that there was strictly no contest by Mrs. Turner, the sister, because it was never brought to a trial, by reason of its abandonment, and that David Wade, Jr., cannot be said to have resisted or opposed the will, within the meaning of the testator, because he never appeared upon the records of the court as such contestant. We do not think this argument is sound. The steps taken by Mrs. Turner constituted opposition to that unlitigated probate or establishment of her father's will, which it was his great care to secure. And the participation of David Wade, Jr., in such contest, was of the same character, however deficient in the candor of open resistance. To relieve him under such circumstances, and, at the same time, to visit her with the penalty of a forfeiture, would be, in effect, to permit the law to place a premium on artifice, and to suffer the just reproach of seeking after the shadow instead of the substance. We see here the very fullest scope for the operation of the principle, *Qui facit per alium, facit per se*.

The court below erred, however, we think, in allowing evidence which was merely secondary to be introduced, of such contest. The statute requires that, in contesting the validity of wills, the grounds of contestation must be alleged in writing. (Code of 1876, § 2317.) The evidence shows that this was done; and a copy of the record should have been produced, or its loss accounted for, so as to authorize secondary evidence of its contents. The testimony of the probate judge fails to show that any search has been made for the missing paper. It is true that he certifies to the fact, that the transcript contains "a full, true and perfect copy of all the proceedings," in the matter of the probate of the will, "so far as they appear of record," in the Probate Court. This general statement is not sufficient. The Probate Court was the proper place of deposit for the paper; and the first presumption would be, that it was there, unless shown to be elsewhere; and it would be sufficient, probably, to show a proper search in such office. The negative averment of the fact, derived by implication from the statement of the correctness of the record, is not sufficient. It does not satisfy the requirements of the law, which exacts such a search as to establish a reasonable presumption of the loss of the document or paper. (1 Greenl. Ev. § 558.) It must be by one having access to the probable or known place of deposit, and ought, in general, to be recent. (1 Whart. Ev. § 147; *Preslar v. Stallworth*, 37 Ala. 402; *Calhoun v. Thompson*, 56 Ala. 166.)

For this error, the decree of the Chancery Court must be reversed, and the cause remanded.

BRICKELL, C. J., not sitting.

Condition not to contest will.—In England, a condition not to dispute the will, where the subject of disposition is personal estate, is regarded as *in terrorem*, and, therefore, where there is a reasonable occasion for contest, a legatee, by disputing the will, does not, on that account, forfeit his legacy. *Powell v. Morgan*, 2 Vern. 90; *Morris v. Burroughs*, 1 Atk. 404.

It appears to be otherwise in case the legacy be given over upon breach

of the condition. *Cleaver v. Spurling*, 2 P. W. 528; *Stevenson v. Abington*, 11 W. R. 935.

But a gift over to the executors of the first legatee is not sufficient to form the exception. *Cage v. Russell*, 2 Vent. 352.

But this rule is not applied to devises of real estate. A condition that the devisee shall not dispute the will is entirely valid, and a contest works a forfeiture. *Cooke v. Turner*, 15 M. & Wel. 727; *Shep. Touchstone*, 132; *Anon.* 2 Mod. 7; *Violett v. Brookman*, 26 L. J. Ch. 308.

A devise on condition not to take any proceedings at law in reference to the testator's property is held too broad, and, as it might prevent the devisee from protecting the property after he acquires it, the condition was held repugnant and void. *Rhodes v. Land Company*, 29 Beav. 560.

It is settled law in the United States that no one can take under a will, and at the same time make a claim against it, but conditions not to dispute, in case of legacies, are here, as in England, usually held *in terrorem*, and will not work a forfeiture unless there is a gift over to another person upon breach of the condition. *Fredericks v. Gray*, 10 Serg. & R. 182; *Hyde v. Baldwin*, 17 Pick. 303.

For a contrary doctrine as to legacies, see *Rogers v. Low*, 1 Black. 253.

Where a condition not to claim under certain deeds was held to work a forfeiture, although the claim, when made, was disallowed. A similar instance is found in *Brownson v. Gifford*, 8 How. Pr. 389.

The words "loath to offend, by the word 'pay,' the generous feelings of my friends A. and B., I wish their acceptance of," were, in *Massachusetts*, held to constitute a condition which, being broken by an action brought by the legatees, forfeited their legacies. *Hopgood v. Houghton*, 22 Pick. 480.

The general rule in the United States in regard to such conditions imposes upon devisees is the same as in England. In *Ohio*, a condition excluding any devisee "who goes to law to break my will," was held valid. *Bradford v. Bradford*, 19 Ohio, 546.

So in *Georgia*. *Shivers v. Goat*, 40 Ga. 676.

In *Pennsylvania*, such a condition, where there was good cause for the litigation, was held not to take effect, and the devisee did not, by contesting, forfeit his devise. *Chew's Appeal*, 45 Penn. St. 228.

In *South Carolina* such conditions are held void. *Mallet v. Smith*, 6 Rich. Eq. 12.

And in *New York*, where the opposition was interposed in good faith, and was not vexatious, such a clause was declared inoperative. *Jackson v. Westervelt*, 61 How. Pr. 399.

BATES vs. BATES.

[184 Massachusetts, 110.]

REQUEST TO PRESERVE AND ADORN PRIVATE MONUMENT.

A provision in a will establishing a fund for the preservation, embellishment and repair of a monument erected by the testatrix is void as creating a perpetuity for a non-charitable use.

A power of sale for an object which cannot be accomplished, cannot itself be exercised.

J. A. Gillis, for plaintiff.

W. H. Gove, for defendant.

DEVENS, J. The question in this case arises upon an alleged breach of contract by the defendant, in declining to accept a conveyance from the plaintiff of a certain house and land in Salem, which he had in writing agreed to purchase for a fixed sum, upon receiving a satisfactory deed thereof. The deed tendered is in proper form, and duly executed by the plaintiff, as administrator with the will annexed; but the defendant denies that the plaintiff has the right to sell the said real estate in his capacity as administrator, and asserts that the instrument tendered does not convey a good title. The right of the administrator to sell the real estate, which was a part of that of which Mrs. Hannah M. Johnson died seized, depends upon the residuary clause of her will, which has been admitted to probate. Her husband, William O. Johnson, had died before her, and by his will had provided for the erection of a monument in memory of himself and his wife, at an expense of \$3,500. The sum of \$3,000 was to be expended for the monument, and \$500 to be retained in the hands of trustees. This monument has since been constructed, substantially like that described in the will of Mrs. Johnson, at an expense of about \$3,000, from the funds of the husband's estate, and the sum of \$500 remains in the hands of the trustees named in his will for its repair, and for beautifying the lot upon which it stands, which is more than sufficient for that purpose.

In regard to this bequest, no question is presented, and it is only to be considered as it may bear upon the interpretation of Mrs. Johnson's will. This was apparently made when some uncertainty existed whether her husband's property would be sufficient to provide for all his bequests. After bestowing a large number of specific legacies, the residuary clause occurs, which, as written and punctuated, is quite unintelligible. If mere changes in punctuation will make that intelligible which otherwise is not so, and if the meaning thus evolved is apparently in accordance with the general phraseology of the will, or the sentence in which it is found, it may be safely adopted.

The residuary clause is as follows: "My house and furniture, silver plate, fixtures and everything to be sold, if their should not be enough from my husband's estate for a monument, I wish to have my money expended for a monument of granet with four pillows like one in the grove, only larger, if their should be money enough left from my husband's estate. I want a memento of Hope, Faith and Charity, the expences to be taken from my own estate, and his name cut on the steps, the remainder left I wish it to be kept in trust to beautify and keep the it in good order. I wish this to be carried strictly through."

Without any changes in punctuation, a general design may be seen here to direct her house, &c., to be sold for the purpose of erecting the monument, provided for by her husband's will, with the proceeds, in case his estate should not be sufficient for that purpose, except that it is to be larger than the monument to which reference is made for a description; that in case there is money enough for that purpose from her husband's estate, a memento is to be erected at the expense of her own estate, which is to be a design of Hope, Faith and Charity, upon which memento her husband's name is to be cut; and that the remainder of her property is to be kept in trust to beautify and keep in order the monument. The residuary clause may, without changing, transposing or introducing words, be read intelligibly by altering punctuation and orthography only, thus: "My house, furniture, silver plate, fixtures and everything to be sold. If there should not be enough from my husband's estate for a

monument, I wish to have my money expended for a monument of granite with four pillars like the one in the grove, only larger. If there should be money enough left from my husband's estate, I want a memento of Faith, Hope and Charity, the expenses to be taken from my own estate and his name cut on the steps: the remainder left I wish it to be kept in trust to beautify and keep the *it* in good order." We cannot doubt that the pronoun "*it*" in the last line refers to the monument or the memento, whichever should be erected by her estate. The residuary clause concludes with the words, "I wish this to be carried strictly through."

The language by which the testatrix provides that her house, furniture, &c., are to be sold, is in substance a direction that such a sale shall be made by the executor of her will. Followed immediately, as it is, by the expression of her wish that her money shall be expended in a particular way, it is shown that she intends that the property named by her is to be turned into money, in order that the money thus raised should be expended for the purposes stated by her. If these purposes for any reason cannot be carried out, the right to sell given by the will ceases. The object for which the power was given must exist in order that the right to exercise it may exist. If one by his will should charge a pecuniary legacy upon a specified piece of real estate, and should direct his executor to sell such piece to satisfy the legacy, if the legacy were to lapse, the power to sell would fail. The scheme of the testatrix was in part to erect a monument, or, if that should be accomplished at the expense of the estate of her husband, then a memento, as she terms it.

The monument was erected at the expense of the husband's estate, and, as the facts agreed show, the erection of the memento has already been accomplished: for that purpose it is not now necessary to sell the real estate. It will not be important, therefore, to consider whether this provision could be separated from that which provides for the sale of the real estate, in order to constitute a permanent fund for beautifying and keeping it in order, to which the remainder, after erecting the monument or memento, was to be devoted. Funds cannot be established indefinitely inalienable in the hands of those to whom they are

intrusted, and their successors, the income of which is to be perpetually devoted to uses which are not, legally speaking, charitable. To charities the rule of public policy which forbids this does not apply. (*Odell v. Odell*, 10 Allen, 1.) That the testatrix sought to create a fund in perpetuity for the beautifying and keeping in repair the monument or memento clearly appears, and the inquiry therefore is whether this is a charitable use.

The St. of 43 Eliz. c. 4, so far as it recognizes, defines or indicates what are charitable uses, has frequently been held to be a part of our common law. (*Earle v. Wood*, 8 Cush. 430, 445.) In determining what are charitable uses, we are not limited by the enumeration of them as contained in that statute, which is an attempt to show by familiar examples what classes or kinds of uses are to be considered charitable, or so beneficial to the public as to be entitled to the same protection as strictly charitable uses, rather than a complete specification of them. (*Drury v. Natick*, 10 Allen, 169.) But, that it may be charitable, the use must be of such a character that the general public is to have the advantage of it, and not merely individuals. In *Giles v. Boston Fatherless & Widows' Society*, 10 Allen, 355, where a gift had been made to a charitable society upon condition that it should keep the tomb of the testator in repair, it was remarked that it might well be doubted "whether this condition to maintain a private tomb or burial-place was not void, as tending to create a perpetuity." It was not thought necessary there to decide the question; because, if void, it did not defeat the gift, and, if valid, it had been sufficiently complied with. But an examination of the authorities there cited, with others, will show that it has been repeatedly held that a bequest to provide a fund for the permanent care of a private tomb or burial-place could not be treated as a public charity and thus made perpetual, and that such bequest would be void. (*Durour v. Motteux*, 1 Ves. Sen. 320; *Doe v. Pitcher*, 6 Taunt. 359, 370; *Lloyd v. Lloyd*, 2 Sim. (N. S.) 255, 264; *Rickard v. Robson*, 31 Beav. 244; *Fowler v. Fowler*, 33 Beav. 616; *Carne v. Long*, 8 W. R. 570; *Mellick v. Asylum*, Jacob, 180.)

No distinction between these cases and that at bar can be

made favorable to the latter. The repair of a private monumental structure is a matter strictly individual and personal. The fund constituted by the testatrix is to be expended for her own gratification, upon an object in which the public has no interest, and which has no proper similitude to a charitable use. "It stands," as the Master of the Rolls remarks in *Mellick v. Asylum*, *ubi supra*, "on the same footing as an expensive funeral."

The statutes of Massachusetts have permitted cemetery corporations to hold money in trust to apply the income to the care, preservation or embellishment of any lot or its appurtenances. Where towns have provided cemeteries, they have also been permitted to receive money to the amount of five hundred dollars for the care and preservation of a lot held by any individual. (Pub. Sta. c. 82, §§ 8, 17.)

These statutory provisions have here no application. The provision in the testatrix's will, establishing a fund for the preservation, embellishment and repair of the monument or memento erected by her, is therefore void, as it seeks to create a perpetuity for a use not charitable. The right to sell, having been given for an object which cannot be accomplished, cannot itself be exercised. The result is that the plaintiff has not made a good title to the defendant by his deed.

Judgment for the defendant affirmed.

See *Piper v. Moulton*, 2 Am. Prob. R. 574, and cases in note.

FENNELL vs. HENRY.

[70 Alabama, 484.]

ADVANCEMENT. PAROL EVIDENCE.

A transfer of slaves by a parent to his daughter, taking back an interest-bearing promissory note in the amount of their estimated value, shows a debt and not an advancement, and parol evidence is not admissible to show that an advancement was intended.

APPEAL from Marshall Chancery Court.

Bill for the final settlement and distribution of the estate of James W. Fennell, deceased.

The facts appear in the opinion.

Humes & Gordon and *Cabaniss & Ward*, for appellants.

Denson & Disque and *Watts & Sons*, opposed.

STONE, J. "Any estate, real or personal, which has been given by any intestate in his lifetime, as an advancement to any child, or other lineal descendant, must be considered as part of the estate, so far as regards the division and distribution thereof amongst his children or their descendants, and must be taken by such child or descendants towards his share of the estate of the deceased." (Code of 1876, § 2262.) "The maintaining, education or giving money to a child, or other lineal descendant, without intending it as a portion or settlement in life, is not an advancement." (*Ib.* § 2267.)

We have, in these two sections, a pretty clear intimation of what the legislature intended should be regarded as an advancement, and what should not be so regarded. It must be a gift—a perfected gift, parting with the ownership—made during life to a child, or other lineal descendant. Its purpose must be to advance such child, or lineal descendant, in life. This is done, by giving, by anticipation, the whole, or a part, of what it is supposed a child will be entitled to on the death of the parent, and must be proved to have been intended as an advancement, chargeable on the child's share of the estate. (*Osgood v. Beers*, 17 Mass. 355; *Shaw v. Kent*, 11 Ind. 80.) And the statute also informs us what classes of gifts or presents must not be treated as advancements; namely, those supplied in maintenance or education, and gifts made, not intending them as a portion or settlement in life. We think the natural import of this language is, that when the subject of the gift has substantial value—will be solidly useful in setting up the child or descendant in life—then the *prima facie* intendment is, that it is an advancement to be taken into account in distribution. But

this presumption may be overturned by proof. On the other hand, expenditures in maintenance or education, presents not ordinarily regarded as useful in setting up the child in life, or other gifts shown not to be intended as advancements to be accounted for, are not to be brought into account in final settlement. Hence, this court has many times said: "The rule is, that when money or property is given by a parent to his child, it will be presumed to be an advancement under the statute, unless the nature of the gift repels such presumption; as in the case of trifling presents, money expended for education, etc." (*Mitchell v. Mitchell*, 8 Ala. 414; *Butler v. Mer. Ins. Co.* 14 Ala. 777; *Merrill v. Rhodes*, 37 Ala. 449; *Autrey v. Autrey*, *Ib.* 614.) So, it is settled, that what a parent says, at the time he gives property to a child, is competent evidence of the intention with which the gift is made. (See authorities, *supra*; also, *Lawson's Appeal*, 28 Penn. St. 85; *Phillips v. Chappell*, 16 Ga 16.)

There seems to be no controversy in this case, as to the nature of the title Dr. Fennell conveyed, and intended to convey, to Mrs. Henry, his daughter. The slaves were evidently intended to be her property from the time of the transaction. Now, this transaction was intended to be a sale of the slaves to be paid for, an advancement to be accounted for in distribution, or a gift outright not to be accounted for. No one contends it was a gift outright, and the attendant circumstances clearly showed it was not so intended. Was it intended as a sale? Was it intended that Mrs. Henry should pay her father, Dr. Fennell, for the slaves? This must depend on the facts as they transpired at the time. Only two persons testify as to what took place—Mrs. Fennell and Mrs. Henry. They alone, except Dr. Fennell, were present. In many respects they differ; but, in all important particulars, the difference is much less than, at first blush, it appears to be. Mrs. Fennell testifies, positively, that the slaves were given as an advancement, to be accounted for in distribution, and that Dr. Fennell so informed Mrs. Henry at the time. Mrs. Henry testifies as follows: "To 25th interrogatory she saith: 'I executed a note to my father for certain negroes, but not as an advancement. He never said

a word about advancement, but said he had as soon for me to use some of his property while he was yet living, as to get it after his death. Never thought of it as an advancement—never heard the word advancement used in regard to the negroes until summer of 1878.’” Answer to 27th interrogatory: “Father was not making advancements at the time the note was given. He was willing for me to have the use of some of his property while he was living, as to get it after his death. So he remarked at the time the note was taken bearing interest from date, from the fact he had made no advancements to the children. Note was taken bearing interest. That interest was to pay for use of the negroes. The note with interest was to be paid out of my part of my father’s estate. If that was not enough, the negroes stood good for the rest.” Speaking of giving the receipt to her mother, Mrs. Henry, in answer to 53d interrogatory, says: “Mother wrote a receipt, stating that I had received \$2,000 from my father, that I refused to sign. Afterwards she wrote one for the negroes. I told her I had never received any money from my father, and to sign that would be signing an untruth.” She signed the receipt for the negroes, and soon afterwards said, “I do not believe those who will wind up the estate will charge me with the negroes.” Answer to 42d interrogatory. Answering the 7th interrogatory she had said: “I know intentions and designs of my father in regard to said note at time of its execution, in regard to its payment, and how it was to be paid.”

In one place Mrs. Henry testified, she received the slaves as a purchase, and was to pay for them. In many places she denied receiving them as an advancement. Yet, when she comes to testify what was the understanding—what the declaration of her father when she obtained the slaves and gave the note—she expresses substantially all the ingredients of an advancement, although the word *advancement* was not used. This transaction took place soon after Mrs. Henry’s marriage. The property came from her father to her, by way of anticipation—that she might enjoy some of his property during his life—not to be paid for to him, or during his lifetime, but to be paid out of her part of her father’s estate. This, then, is

what she means by purchase of the slaves, and payment of the purchase-money note. As facts, if there be nothing in the giving of the note, they prove an advancement, and not a sale of the slaves to be paid for. (2 Lomax on Ex'rs, 367 [215] *et seq.*; 2 Williams on Ex'rs, 1351, *et seq.*; *Speer v. Speer*, 14 N. J. Eq. 240; *Clark v. Warner*, 6 Conn. 355; *Meeker v. Meeker*, 16 Conn. 383; *Wentz v. Dehaven*, 1 Sergt. & R. 312; *Lawson's Appeal*, 23 Penn. St. 85; *Kingsbury's Appeal*, 44 Penn. St. 460; *Batton v. Allen*, 1 Halst. Ch. 99; *Cleaver v. Kirk*, 3 Metc. Ky. 270; *Cecil v. Cecil*, 20 Md. 153; *Cawthorn v. Coppedge*, 1 Swan, 487; *Vaden v. Hance*, 1 Head, 300.)

It is contended for appellant, that inasmuch as Dr. Fennell, when he delivered the slaves to Mrs. Henry, his daughter, took from her a note, bearing interest, for the estimated value, this proves the transaction was a sale, and parol evidence cannot be received to prove it was intended as an advancement. *Grey v. Grey*, 22 Ala. 233, is relied on in support of this position. The point actually ruled in that case was, that a note executed by the child to the parent was evidence of a debt, and was not evidence of an advancement. This question was raised on the record, and was correctly ruled. Certainly the giving of a note, which is evidence of a debt due from the child to the parent, is, *per se*, no evidence of a gift or advancement from the parent to the child. *Prima facie*, it is the very opposite. The court, in that case, went farther, and said, parol evidence will not be received to show that, at the time the note was taken, it was intended the transaction should be an advancement, and that the note did not represent a debt to be paid. The court had said: "The bill of exceptions does not set out the parol evidence given in the court below, and, consequently, we cannot say that it erred in receiving it." What the court said in regard to receiving parol evidence of the parent's intention was consequently *dictum*.

Gilbert v. Wetherell, 3 Sim. & Stu. 254, presents the case of a father who furnished his son ten thousand pounds to engage in trade, and took his note for the sum, payable on demand. The business not prospering as the son had expected, he wished to withdraw from it, but continued in business at the request

of his father. On his death-bed the father had the note destroyed. *Held* an advancement, with which the son was chargeable.

In *Stewart v. The State*, 2 Har. & Gill, 114, the court said : " The well-settled rule of law, that parol evidence cannot be offered to explain, contradict, or add to the terms of a written contract, which, it was contended, precluded the appellant from going into extrinsic evidence to show the true character and design of the bill of sale, we do not think applicable to the question before us. No effort is here made to impeach or defeat the title transferred by this conveyance, or to alter or impair the rights of the *cestui que use* under it, as far as relates to the property which it professes to convey ; but the inquiry is into the title of the parties to other property, in which this bill of sale is incidentally used as evidence, and comes, as it were, collaterally in question. If the door to such an examination were excluded, the provisions of the act of 1798, respecting advancements, would become a dead-letter in most cases, when written instruments are used to give validity to the settlements intended ; as it most rarely occurs that some money consideration is not expressed in the deed. If such a barrier to the discovery of truth and the administration of justice were to be sanctioned, it would be contrary to the whole scope and design of those just, important and statutory principles of our government, which provide for an equal distribution of an intestate's estate amongst all his representatives. It would, in effect, repeal one of the wisest and most wholesome provisions of our testamentary system." So, in this case, the testimony offered was not intended to affect the title to the slaves turned over by Dr. Fennell to his daughter. The sole purpose was to affect her claim to other property.

In *Powell v. Powell*, 5 Dana, 168, the advancement alleged was a tract of land conveyed by father to son, on a recited consideration of five hundred dollars paid. Declarations of the father were received as evidence that it was an advancement. The court said : " The question here is not as to the operation of the deed, or the responsibility or obligation arising upon it, but as to the intention of the parties. And as the expression

of a moneyed consideration may have been adopted for the mere purpose of showing the estimated value of the land, and fixing the responsibilities of the parties accordingly, without any money or property paid or to be paid by the grantee, we are of opinion that it should not be deemed conclusive evidence beyond that purpose. * * In this view of the subject, it would seem that the intention of conveying the land by way of advancement, is not necessarily inconsistent with the expression of a fixed consideration, and that it may, therefore, be proved by parol." (See, also, *Shaw v. Kent*, 11 Ind. 80; *West v. Bolton*, 23 Ga. 531.)

In *Clements v. Hood*, 57 Ala. 459, a married woman had executed a writing, found among the papers of the intestate, which, unexplained, imported an advancement made to her. We said: "Under the rules of the common law, such contract made by a married woman is void, and imposes no obligation, as a contract, on her. It could only amount to proof of an admission, made by her, that she had received such property. Such admission is not conclusive, but is, at most, evidence to be weighed. Any other legal evidence, contradictory or otherwise, should have been received, bearing on the question of advancement *vel non*." Speaking of the policy and purpose of our statute on the subject of advancements, this court, in *Mitchell v. Mitchell*, 8 Ala. 414, said, its theory is, "that every parent wishes to do equal justice to his children, and that money or property given to them during his life is, and was intended, as a part of their portion, unless he manifests the contrary at the time, or unless such presumption arises from the nature of the gift or expenditure."

In this case the testimony is very strong and very full, that when Dr. Fennell gave the possession of the slaves to Mrs. Henry, he intended they should be her property, and that she should not pay for them during his life. She could not pay for them, for she had no property, other than the slaves given, with which to make payment. The note, as promise to pay, was void, for she could make no binding contract to pay money. It was, at most, an acknowledgment; in this case, probably acknowledgment of value. Mrs. Fennell testifies they were to

be accounted for in final distribution, as part of Mrs. Henry's distributive share. In these respects, Mrs. Henry's understanding, as testified by her, was not materially different from that of her mother. This constitutes an advancement, although the word *advancement* may not have been used. The law regards the substance, not the names of things. We may add, that may witnesses testify to admissions by Mrs. Henry, confirmatory of the theory, that she was to be charged with the slaves in distribution. Her remark to her mother, when she executed the receipt, that she did not believe those who would wind up the estate would charge her with the negroes, shows that she even then thought she should be charged with them in distribution, but for the fact that slaves had been emancipated. That she trusted or hoped would relieve her. In this she was mistaken. The advancement being made in 1859, abolition of slavery in 1865 did not relieve her. The loss was her loss.

The case of *Terry v. Keaton*, 58 Ala. 667, is distinguishable from this. The note which was sought to be varied by parol proof in that case, was a binding personal contract on the husband, and the question arose in a direct proceeding based on the note as a valid money obligation. Though void as a promise to pay by Mrs Keaton, it nevertheless operated a charge on the lands. In this case the note is absolutely void as a money obligation, binds neither person nor thing, and it is no part of the purpose of the suit to obtain a recovery based upon it. As we have said, the purpose is to affect the right to other property,—not the slaves, on account of which the paper was executed.

The remark of Dr. Fennell, testified to by Mrs. Henry, that in the event of emancipation of the slaves, he did not intend to hold Mrs. Henry accountable for the slaves he had given her, was but an unexecuted intention to release, and does not amount to a discharge. A gift or gratuity, to be binding, must be completely executed. (2 Brick. Dig. 40, §§ 1, 2, *et seq.*)

We have shown above that Mrs. Henry's note is to be treated only as an acknowledgment. As a promise to pay it is absolutely void. Hence, as a promise to pay interest, it is inoperative, and the question of interest on the advancement must be

determined by the law. No interest must be charged. (*Krebs v. Krebs*, 35 Ala. 293.) We need scarcely add, that the question we have been considering must be determined without any reference to the surrender of the note by Mrs. Fennell, and its destruction by Mrs. Henry.

What is written above is the individual opinion of the writer. Not a conclusive conviction, for he has some misgivings on the subject. Still, he prefers the result his argument leads to, because, in his opinion, it clearly appears that Dr. Fennell did not intend the transaction should be a gift of the slaves not to be accounted for, and did not intend it to be a sale, the slaves to be paid for as in ordinary cases of sale. It cannot be treated as a sale, for Mrs. Henry had no capacity to make the purchase, or to bind herself. All men are presumed to know the law; and hence we must presume Dr. Fennell knew that the note of his daughter, Mrs. Henry, was, as a contract to pay money, utterly null and void. If, then, it be not an advancement, there is but one remaining possible category—namely, that it was intended as an absolute gift, not to be accounted for in distribution. So, my judgment is, in fact, the result of the logical process of reasoning by exclusion.

My brothers, however, differ with me, and hold that because the transaction was evidenced by what in form is a promissory note, parol evidence cannot be received to show an intention different from that evidenced by the giving of the note. They adhere to the rule asserted in *Grey v. Grey*, 22 Ala. 233, "that if a written instrument is perfect in itself, it must be the sole expositor of the intention of the parties to it; and parol proof of an agreement between them, not reduced to writing, which is repugnant to the terms and intentions expressed in the written instrument, cannot be allowed." They think that principle applicable to such a case as this. They refer to the following authorities in support of their views: *Terry v. Keaton*, 58 Ala. 667.

The result is, that the decree of the chancellor is affirmed.

PICKENS vs. DAVIS.

[184 Massachusetts, 252.]

REVIVAL OF FORMER WILL BY CANCELLING LATER ONE.—ADMISSIBILITY OF TESTATOR'S DECLARATIONS.

Whether the cancellation of a duly executed will containing a clause expressly revoking former wills, revives a former will which has not been destroyed, is a question of intention to be collected from all the circumstances of the case. Oral declarations of a testator made after cancelling a will are admissible in evidence to show whether or not he intended to revive an earlier will.

APPEAL from a decree of the Probate Court allowing the will of Mary Davis.

H. Kingman, for appellee.

E. Robinson, for appellant.

ALLEN, J. The two questions in this case are, first, whether the cancellation of a will, which was duly executed, and which contained a clause expressly revoking former wills, has the effect, as matter of law, to revive a former will which has not been destroyed, or whether in each instance it is to be regarded as a question of intention, to be collected from all the circumstances of the case; and secondly, if it is to be regarded as a question of intention, whether subsequent oral declarations of the testator are admissible in evidence for the purpose of showing what his intention was. These are open questions in this Commonwealth. In *Reid v. Borland*, 14 Mass. 208, the second will was invalid, for want of due attestation. In *Laugh-ton v. Atkins*, 1 Pick. 535, the second will was adjudged to be null and void, as having been procured through undue influence and fraud; and the whole decision went upon the ground that it was never valid, and could not be.

The first of these questions has been much discussed, both in England and America; and it has been often said that the courts of common law and the ecclesiastical courts in England are at variance upon it. (See 1 Wms. on Executors (5th Am.

ed.) 154—156, where the authorities are cited.) The doctrine of the ecclesiastical courts was thus stated in 1824, in *Usticke v. Bawden*, 2 Add. Ecc. 116, 125: "The legal presumption is neither adverse to, nor in favor of, the revival of a former uncancelled, upon the cancellation of a latter revocatory will. Having furnished this principle, the law withdraws altogether; and leaves the question, as one of intention purely, and open to a decision, either way, solely according to facts and circumstances." (See also *Moore v. Moore*, 1 Phillim. 406; *Wilson v. Wilson*, 3 Phillim, 543, 554; *Hooton v. Head*, 3 Phillim. 26; *Kirkcudbright v. Kirkcudbright*, 1 Hagg. Ecc. 325; *Welch v. Phillips*, 1 Moore's P. C. 299.) In *Powell on Dev.* (ed. of 1827) 527, 528, a distinction is taken between the effect of the cancellation of a second will which contains no express clause revoking former wills, and of a will which contains such a clause; and in respect to the latter it is said that, "if a prior will be made, and then a subsequent one expressly revoking the former, in such case, although the first will be left entire, and the second will afterwards cancelled, yet the better opinion seems to be, that the former is not thereby set up again." Jarman's note questions the soundness of the above doctrine (p. 529, n.). While this apparent discrepancy in the respective courts remained not fully reconciled, in 1837 the English Statute of Wills was passed (St. 7 Will. IV, and 1 Vict. c. 26, § 22), of which provided, that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same." Since the enactment of this statute, the decisions in all the courts have been uniform, that after the execution of a subsequent will which contained an express revocation, or which by reason of inconsistent provisions amounted to an implied revocation, of a former will, such former will would not be revived by the cancellation or destruction of the later one. (*Major v. Williams*, 3 Curt. Ecc. 432; *James v. Cohen*, 3 Curt. Ecc. 770, 782; *Brown v. Brown*, 8 El. & Bl. 876; *Dickinson v. Swoatman*, 30 L. J. (N. S.) P. & M. 84; *Wood v. Wood*, L. R. 1 P. & D. 309.) In order to have the

effect of revocation, it must of course be made to appear that the later will contained a revocatory clause, or provisions which were inconsistent with the former will; and the mere fact of the execution of a subsequent will, without evidence of its contents, has been considered insufficient to amount to a revocation. (*Cutto v. Gilbert*, 9 Moore's P. C. 131. See also *Nelson v. McGiffert*, 3 Barb. Ch. 158.)

In the United States, there is a like discrepancy in the decisions in different States, though the clear preponderance appears to be in favor of a doctrine substantially like that established in the ecclesiastical courts. This rule was established in Connecticut, in 1821, in *James v. Marvin*, 3 Conn. 576, where it was held that the revocatory clause in the second will, *proprio vigore*, operated instantaneously to effect a revocation, and that the destruction of the second will did not set up the former one; and the like rule was declared to exist in New York, by the Supreme Court of that State, in 1857, in *Simmons v. Simmons*, 26 Barb. 68. The question was greatly considered in Maryland, in 1863, in *Colvin v. Warford*, 20 Md. 357, 391, and the court declared that "a clause in a subsequent will, which in terms revokes a previous will, is not only an expression of the purpose to revoke the previous will, but an actual consummation of it, and the revocation is complete and conclusive, without regard to the testamentary provisions of the will containing it." The court further held that the cancellation of a revoking will, *prima facie*, is evidence of an intention to revive the previous will, but the presumption may be rebutted by evidence of the attending circumstances and probable motives of the testator. In *Harwell v. Lively*, 30 Ga. 315, in 1860, a similar rule was laid down, and maintained with great force of reasoning. The opinion of the court concludes with the following pertinent suggestion: "It must be conceded there is much law adverse to the doctrine. . . . Calculated as it is to subserve and enforce the tenor and spirit of our own legislation, and to give to our people the full benefit of the two hundred years' experience of the mother country, as embodied in the late act, is it not the dictate of wisdom to begin in this State where they have ended in England? We think so." (See also *Barksdale v. Hopkins*,

23 Ga. 332.) The courts of Mississippi, in 1836, and of Michigan, in 1881, adopted the same rule. (*Bohanon v. Walcott*, 1 How. (Miss.) 336; *Scott v. Fink*, 45 Mich. 241.) It is to be observed, that some of the foregoing decisions are put expressly on the ground that the later will contained an express clause of revocation. (45 Mich. 246; 20 Md. 392.) An examination of the cases decided in Pennsylvania leads us to infer that a similar rule would probably have been adopted in that State, if the question had been directly presented. (*Lawson v. Morrison*, 2 Dall. 286, 290; *Boudinot v. Bradford*, 2 Yeates, 170; s. c. 2 Dall. 266; *Flintham v. Bradford*, 10 Penn. St. 82, 85, 92.)

On the other hand, in *Taylor v. Taylor*, 2 Nott & McC. 482, in 1820, it was held in South Carolina that the earlier will revives upon the cancellation of the later one; and the same rule prevails in New Jersey, as is shown by *Randall v. Beatty*, 4. Stew. (N. J.) 643, and cases there cited.

In various States of the Union, statutes have been enacted substantially to the same effect as the English statute above cited, showing that wherever, so far as our observation has extended, the subject has been dealt with by legislation, it has been thought wiser and better to provide that an earlier will shall not be revived by the cancellation of a later one. There are, or have been, such statutes in New York, Ohio, Indiana, Missouri, Kentucky, California, Arkansas and Virginia, and probably in other States. Concerning these statutes of New York, it is said, in 4 Kent's Com. 532, that they "have essentially changed the law on the subject of these constructive revocations, and rescued it from the hard operation of those technical rules of which we have complained, and placed it on juster and more rational grounds."

On the whole, the question being an open one in this State, a majority of the court has come to the conclusion that the destruction of the second will in the present case would not have the effect to revive the first, in the absence of evidence to show that such was the intention of the testator. The clause of revocation is not necessarily testamentary in its character. It might as well be executed as a separate instrument. The fact that it is inserted in a will does not necessarily show that

the testator intended that it should be dependent on the continuance in force of all the other provisions by which his property is disposed of. It is more reasonable and natural to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions, and substituted therefor a new disposition of his property, which for the present, and unless again modified, shall stand as representing his wishes upon the subject. But when the new plan is in its turn abandoned, and such abandonment is shown by a cancellation of the later will, it by no means follows that his mind reverts to the original scheme. In point of fact, we believe that this would comparatively seldom be found to be true. It is only by an artificial presumption, created originally for the purpose of preventing intestacy, that such a rule of law has ever been held. It does not correctly represent the actual operation of the minds of testators, in the majority of instances. The wisdom which has come from experience, in England and in this country, seems to point the other way. In the absence of any statutory provision to the contrary, we are inclined to the opinion that such intention, if proved to have existed at the time of cancelling the second will, would give to the act of such cancellation the effect of reviving the former will; and that it would be open to prove such intention by parol evidence. Under the statute of England, and of Virginia, and perhaps of other States, such revival cannot be proved in this manner. (*Major v. Williams*, and *Dickinson v. Swatman*, above cited; *Rudisill v. Rodes*, 29 Gratt. 147.) But this results from the express provision of the statute.

In the present case, there was no evidence tending to show that the testatrix intended to revive the first will; unless the bare fact that the first will had not been destroyed amounted to such evidence. Under the circumstances stated in the report, little weight should be given to that fact. The will was not in the custody of the testatrix, and the evidence tended strongly to show that she supposed it to have been destroyed.

The question, therefore, is not very important, in this case, whether the subsequent declarations of the testatrix were admissible in evidence for the purpose of showing that she did not

intend, by her cancellation of the second will, to revive the first; because, in the absence of any affirmative evidence to prove the existence of such intention, the first will could not be admitted to probate. Nevertheless we have considered the question, and are of opinion that such declarations were admissible for the purpose of showing the intent with which the act was done. The act itself was consistent with an intention to revive, or not to revive, the earlier will. Whether it had the one effect, or the other, depended upon what was in the mind of the testatrix. It would in many instances be more satisfactory to have some decisive declaration made at the very time, and showing clearly the character of the act. Evidence of declarations made at other times is to be received with caution. They may have been made for the very purpose of misleading the hearer as to the disposition which the speaker meant to make of his property. On the other hand, they may have been made under such circumstances as to furnish an entirely satisfactory proof of his real purpose. It is true, that it may not be proper to prove the direct act of cancellation, destruction or revocation in this manner. But when there is other evidence of an act of revocation, and when the question of the revival of an earlier will depends upon the intention of the testator, which is to be gathered from facts and circumstances, his declarations, showing such intention, whether prior, contemporaneous or subsequent, may be proved in evidence.

In the great case of *Sugden v. St. Leonards*, 1 P. & D. 154, the question underwent full discussion, in 1876, whether written and oral declarations made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents; and it was decided in the affirmative. It was admitted in the argument, at one stage of the discussion, that such subsequent declarations would be admissible to rebut a presumption of revocation of the will; but, this being afterwards questioned, it was declared and held, on the greatest consideration, not only that these, but also that declarations as to the contents of the will, were admissible. (See pages 174, 198, 200, 214, 215, 219, 220, 225, 227, 228, 240, 241.) The case of *Keen v. Keen*, L. R. 3 P. &

D. 105, is to the same effect. (See also *Gould v. Lakes*, 6 P. & D. 1; *Doe v. Allen*, 12 A. & E. 451; *Usticke v. Bawden*, 2 Add. Ecc. 123; *Welch v. Phillips*, 1 Moore's P. C. 299; *Whiteley v. King*, 10 Jur. (N. S.) 1079; *Re Johnson's Will*, 40 Conn. 587; *Lawyer v. Smith*, 8 Mich. 411; *Patterson v. Hickey*, 32 Ga. 156; 1 Jarm. Wills (5th Am. ed. by Bigelow), 130, 133, 134, 142, and notes.) The question was also discussed, and many cases were cited, in *Collayan v. Burns*, 57 Maine, 440, but the court was equally divided in opinion. Many, though not all, of the cases, which at first sight may appear to hold the contrary, will be found on examination to hold merely that the direct fact of revocation cannot be proved by such declarations.

The result is, that, in the opinion of a majority of the court, the will should be disallowed, and the decree of the Probate Court reversed.

See *Scott v. Fink*, 2 Am. Prob. R. 410, and cases in note.

VINTON'S APPEAL.

[99 Penn. St. 434.]

LIFE-TENANT OF STOCKS, AND REMAINDER-MAN.—DIVISION OF PROCEEDS OF SALE OF PART OF CORPORATE FRANCHISE AND PROPERTY.

As between a tenant for life and remainder-man of stock held in trust, funds received by the trustee from a sale of part of the franchise and permanent property of the company which issued the stock, belong to the *corpus* of the trust estate.

APPEAL from the Court of Common Pleas of Philadelphia county.

Accounting of the Pennsylvania Company for Insurance on Lives, etc., as trustees for Sarah Vinton, under an indenture made

by James Martin, assigning to the company one hundred shares of the capital stock of the St. Louis Gas Light Company, "to receive all issues, dividends and profits accruing therefrom," and to pay over the same to Sarah Vinton during her life, and on her death to transfer the stock to Frederick Vinton.

The St. Louis Gas Light Company was incorporated in 1837, and claimed the exclusive right to supply gas in the city of St. Louis, but in 1873, to avoid litigation with a rival company claiming like privileges as to part of the city, they sold their claim to the exclusive right to furnish gas to about one half of the city, together with the pipes, lamps, etc., for supplying the gas, for \$650,000, which they divided amongst their stockholders as a dividend.

The trustee on the present case received \$4,995 as the amount awarded to the 100 shares held by him.

There was no evidence to show the intrinsic value of the stock before or after the dividend was made.

The court below confirmed the auditor's report, holding that the moneys received by the trustee formed part of the principal of the fund held by him.

George Junkin, for appellant.

J. G. Johnson and *Edward Shippen*, for appellees.

GORDON, J. The court below having ascertained, beyond doubt, that the money in controversy was derived, not from the annual earnings or accumulations of the St. Louis Gas Company, but from a sale of part of its franchise and permanent property, thought it ought, of right, to belong to the *corpus* of the trust estate, and thereupon refused to award it to the life-tenant. If we are to follow our own decisions, as found in *Earp's App.* 4 Ca. 368; *The Pennsylvania Co. v. Dovey*, 14 P. F. S. 260; *Moss's Ap.* 2 Nor. 264, and *Biddle's Ap.* (*infra*), the opinion in which was delivered by Mr. Justice Mercur, but a few days ago, we must affirm this conclusion. All these cases are similar to the one in hand; a gift of the income of stocks for life to one person, and the *corpus* over to another,

and by all these we are instructed that in order to ascertain and settle the rights of these parties, we must endeavor to discover what is principal or capital, as distinguished from earnings or dividends resulting from the use of capital.

More than this: following these authorities, we must go even farther, and capitalize, in favor of the remainder-man, the surplus profits which may have accumulated in the treasury of the corporation prior to the date of the creation of the trust. The present case, however, does not carry us to this extent, for the money in controversy comes from a sale of a part of the original franchise and property of the gas company; in fact, part of the very *corpus* represented by the stock shares which form the principal of the trust created by the deed of James Martin.

The charter of this company clothed it with powers and privileges, not only very extensive, but very valuable. By this charter it had "the sole and exclusive privilege of vending gas lights and gas fittings in the city of St. Louis and its suburbs," and it was also empowered to "lay pipes, conduits, etc., in any of the roads and avenues of the suburbs, and in any of the streets and alleys of the city." Also, by indenture of the 8th of January, 1841, between the city and the company, the sole and exclusive privilege of lighting the streets, alleys, wharfs, public buildings and other public places of the city of St. Louis, and of providing and furnishing the fittings and materials of all kinds necessary for that purpose. The result of these grants, and a careful use of them, was great prosperity to the company, and a corresponding rise in its stock. But this very prosperity begat opposition and danger. The city refused to abide by its contract, and to pay up its dues. Another company sprang up, the Laclede, which disputed the exclusive right of the old company to the territory mentioned in its charter. This led to the tripartite agreement of February 8th, 1873, between the city of St. Louis, the Laclede Gas Company, and the St. Louis Gas Company, by which, among other things, the latter company agreed to withdraw from about one-third or one-half of its former territory in favor of the Laclede, and also to sell to it all its mains, pipes, connections, lamps, lamp-posts, brackets,

meters and all other of its property and effects situated and being within the territory from which it had agreed to withdraw.

In consideration of this sale and transfer, the Laclede Company agreed to pay to the St. Louis Company the sum of \$650,000. A dividend of \$600,000, of this money, was ordered by the directors, and of this, \$4,995 came into the hands of the Pennsylvania Co. as trustee of the one hundred shares of stock conveyed to it by the deed, or power of attorney, of James Martin. It is thus manifest that the money in dispute comes, not from the annual earnings of the company, but from a sale of part of its property; part of that very *corpus* which the stock shares represent, and without which those shares have neither substance nor value. If, therefore, the life-tenant is entitled to this money, thus derived from the capital of this corporation, so, in the end, may she come to be entitled to the whole *corpus* of the trust. For the accomplishment of this result, it is only necessary that the St. Louis Gas Company should effect a sale of the balance of its property, and order a distribution of the money so raised among its shareholders. But, logically, the effect of such a doctrine is to defeat the whole object of the trust. Instead of securing for Mrs. Vinton a sure income for life, it gives her the principal to use at her pleasure, whilst the gift over to Frederick Vinton is wholly defeated.

A rule such as this which may operate disastrously on a large and important class of our trusts we cannot agree to adopt. It is, indeed, true, as said by Mr. Chief Justice Chapman, in *Minot v. Paine*, 99 Mass. 101, that the rule, which regards cash dividends, however large, as income, and stock dividends, however made, as capital, is a very simple and convenient one, and may relieve trustees and courts of much trouble, but it is certainly not one that commends itself for its justice and equity, neither does it at all regard the facts of a case like that of *Earp's Appeal*, or like the case in hand. To us, it seems like a bungling rule of law that, at one time, would give what is indisputably income to the remainder-man, and, at another, what is as clearly capital to the life-tenant. It is, however, enough for us that our own authorities repudiate such a rule. In the case

last referred to, it was held, that dividends from a corporate surplus fund, accumulated before the testator's death, must be regarded as part of the stock forming the trust fund, whilst after accumulations, though distributed in the shape of stock, must be treated as income, and go to the life-tenant. In like manner it was held in *Wiltbank's Appeal*, that the earnings or profits of the stock of a decedent, made after his death, were income, though put into the form of capital by the issue of new stock, and it was there said, that "equity, seeking the substance of things, found that the new stock was but a product, and was, therefore, income." So may we say in this case: equity seeking not mere convenience, but the substance of things, finds the dividend, in controversy, to be part of the actual capital of the company—money raised by sale of part of its original franchise and realty, that which its stock most specifically and directly represents—hence, it awards the product to him in whom the stock is finally to vest. Assume the contrary doctrine, and that which we have already pointed out may at any time occur: on a sale of the entire franchise and property of the gas company, with a like order by its directors for a distribution of the money so raised, the dividends must go, regardless of the equities of the parties, to the life-tenant, and nothing whatever be left for the remainder-man. This might be very convenient for trustees and courts, for as it would definitely close out the trust, there would be no further trouble about it; nevertheless, the justice of such a disposition of the trust would be more than doubtful. Again, this same doctrine, which make cash dividend income, and a stock dividend capital, would often work with equal harshness upon the interest of the life-tenant. For corporate earnings might be retained for an indefinite length of time, and then be distributed in the shape of stock shares, which the rule contended for would at once pronounce to be capital, and thus would the beneficiary be deprived of his or her income.

Than this, far better is our Pennsylvania doctrine, admirably stated by our brother, Mr. Justice Paxson, in *Moss's Appeal*, as follows: "But where a corporation, having actually made profits, proceeds to distribute such profits amongst the stockholders, the tenant for life would be entitled to receive them,

and this without regard to the form of the transaction. Equity which disregards the form and grasps the substance, would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits."

Decree affirmed, with costs.

SHARSWOOD, C. J., and PAXSON and TRUNKY, JJ., dissent.

See Biddle's Appeal, *infra*; Hemenway v. Hemenway, *infra*.

SMITH vs. BURCH.

[92 New York, 228.]

WHAT IS MEANT BY "READY MONEY."

A bequest by a wife to her husband of "all the ready money I may have either in bank or elsewhere at my decease," covers the amount of a legacy collected by the husband at her request after the execution of the will.

APPEAL from a judgment of the general term of the Supreme Court in the third judicial department in favor of plaintiff upon a case submitted by agreement. The opinion contains the facts.

George B. Davis, for appellant.

William H. Smith, for respondent.

EARL, J. In December, 1877, Margery Burch, the wife of the defendant, made her will, which, after bequests of legacies to certain relatives named, amounting to \$1,300, contained the following provision: "I further give and bequeath to my beloved husband all the ready money I may have, either in bank or elsewhere, at my decease, before any of the foregoing legacies or bequests shall be paid," and the remainder of her estate

she bequeathed to certain missionary societies for charitable purposes. She died on the 26th day of September, 1881, and in October thereafter her will was admitted to probate and the plaintiff qualified as executor.

In the year 1878 Mrs. Burch, as a legatee under the will of James Stevenson, became entitled to a legacy of \$450, and one McChair was executor of that will, and had funds as such with which to pay the legacy. But there was delay on his part in making the payment to Mrs. Burch by reason of his financial embarrassment. In the early part of the year 1879 Mrs. Burch gave her husband instructions to collect the legacy from McChair for her. Between the 14th day of January, 1880, and the 8th day of December of the same year, he collected the legacy from McChair for his wife, and the sum collected amounted to \$490 25. For some time prior to the 1st day of January, 1880, and up to the time of her death, Mrs. Burch was incompetent to transact her ordinary business and unfit to exercise any control over her property by reason of severe bodily and mental infirmities and unsoundness of mind. As fast as the money was collected by the defendant from Stevenson, between the 14th day of January, 1880, and the 8th day of December of the same year, he used it with his own money in defraying his household expenses, and in procuring nurses and medical attendance for his sick wife, so that at her death no portion of the money received by him from McChair was on hand. During the time he thus expended the money he was able to provide suitably for his family out of his own property.

Upon these facts agreed upon for submission to the general term, the plaintiff claims that the defendant is not entitled, under the will of his wife, to retain the sum of money collected by him of Stevenson, but that he owes this money to the estate of his wife, and he claims to recover that sum of him with interest. On the other hand the defendant claims that he is entitled to the money received by him from Stevenson under the clause of the will above set out.

The facts stated are meager, and it would seem that other facts must have existed which would have enabled the court

with greater certainty to arrive at the intention of the testatrix.

The meaning of the words "money" and "ready money," when used in a will, depends upon the context, and also to some extent upon the condition of the testator's property and the circumstances surrounding his estate; and in construing them, therefore, the courts seek for light in all the provisions of the will and in all the circumstances surrounding the testator and his estate, and it is their aim to give effect to the intention of the testator when that can be ascertained. The word "money" has sometimes been held to include securities, stocks, personal property, money in bank and money in the hands of agents, when the context and all the circumstances which were rightfully considered indicated such to be the intention of the testator. In 2 Williams' Law of Executors (7th ed.), 1188, it is said: "Where a testator gives to one person 'all his moneys in hand' and to another 'all his moneys out on securities,' the balance at his bankers will pass as money in hand. Under a bequest of all the testator's 'money' in the house at A., bank notes and ready money will alone pass, although he may leave in it mortgages, bonds or receipts for government annuities. Where the testator bequeathed all his 'money' in the Bank of England, and never had any cash in the bank, but was entitled to some three per cents and five per cents bank annuities, Sir William Grant, M. R., held that the stock passed. But though upon the whole context of the will stock may pass by the term 'money' yet 'money' does not, by the force of the word, include stock." In 2 Redfield on Wills, 129, it is said: "The word 'money' in a will means that and nothing else, but when used with other words it may have much greater extension." In Wigram on Wills (O'Hara's ed.), 69, the author says: "The term 'money' in America would doubtless pass all debts and annuities, stocks and securities belonging to the testator. The phrase 'ready money' is perhaps usually different in meaning." In Roper on Legacies, it is said that "the word 'money' unaided by the context, will include cash, bank notes, money at the bankers, notes payable to bearer, exchequer bills, and bills of exchange indorsed in blank, because they,

as before observed, are not to be considered as choses in action, but money of the persons in whose possession they are. But choses in action, promissory notes not payable to bearer, government stock, long annuities and Columbian bonds will not pass under the word 'money.'” In the *Estate of Thomas Miller* (48 Cal. 165 ; 17 Am. Rep. 422), the court held that the word “money” used in making a devise in a will will be construed to include both personal and real property, if it appears from the context and on the face of the instrument that such was the intention of the testator. In *Manning v. Purcell* (7 DeG., M. & G. 55), it was held that under a bequest of “all my moneys,” money due on deposit notes, at the testator’s bankers, as well as on the balance of his current account, and also money in the hands of a stakeholder on a bet, would pass. In *Parker v. Marchant* (19 Eng. Ch. 355), it was held that a testator’s balance at his bankers would pass under the words “ready money.” In *Fryer v. Rankin* (11 Simons, 55), there was a bequest in the following words: “I give and bequeath unto my dear wife Susannah Fryer, all my ready money at my bankers, in my dwelling-house or elsewhere; by which I mean money not invested in security or otherwise bearing interest, but which I may have in hand for current income and expenses, at the time of my decease;” and it was held that cash balances in the hands of the testator’s bankers and of his agent, and dividends of stock due at the testator’s death, passed by the bequest, but that the rent of a house and the interest of a sum due on mortgage did not pass. In *Byrom v. Brandreth* (Law Rep. 16 Eq. 475), there was a bequest of “any money of which I may die possessed,” and it was held to include cash in the house and money at the bankers, and any money of which, at the time of her death, she might have claimed immediate payment; but not the apportioned part of an annuity, or of interest payable to her which had accrued from the last stated days of payment to her death, nor a legacy due to her which had not been acknowledged as at her disposal. In *Waite v. Combes* (5 De G. & S. 676), it was held that the word “moneys” must be taken to include stock in the funds. The vice-chancellor said: “There is no doubt

upon the authorities that the word 'moneys' may pass stock in the funds, it being a question of construction upon the whole will whether the testator meant to use the word in that sense or not." In *Beck v. McGillis* (9 Barb. 35) it was held that under a bequest of "all moneys" that the testator should die possessed of, the legatee was entitled to the cash, using the term in its proper sense, which the testator at the time of his death had in his possession, or deposited in bank, and to nothing else. In *Mann v. The Executors of Mann* (1 Johns' Ch. 231), it was held, that where the testator bequeathed to his wife all the rest, residue and remainder of the moneys belonging to his estate at the time of his decease, the word "moneys" must be understood, in its legal and popular sense, to mean gold or silver, or the lawful currency of the country, or bank notes, where they are known and used in the market as cash, or money deposited in bank for safe-keeping; and not to comprehend promissory notes, bonds and mortgages, or other securities, there being nothing in the will itself to show that the testator intended to use the word in that extended sense.

We have made these citations at some length to show what scope has been given to these words, and how differently they have been construed by the courts and text writers. We cannot perceive that they have received different constructions in this country from that which they have received in England. Ordinarily, standing alone, they have been held to mean only that which passes current as money, including also bank deposits. But when read with the context they may be held to mean any kind of personal property, and it is the office of the courts, considering everything which may properly be resorted to for aid, in every case to give effect to the intentions of the testator in their use.

The money here in controversy was received by the defendant from McChair as the agent of his wife. After he received it, it could fairly be treated as "ready money" in his hands for her. At the time he received it she had become imbecile and incompetent to do business, and therefore it remained in his hands as a depository. He used it, subject, however, to his liability to account for it and pay it over whenever lawful

demand should be made upon him for it. It was not money invested in securities, or out upon interest; but it was like money in bank liable to be paid upon call, and held by him as a simple depository. She regarded money in bank, for which the bank was simply her debtor, liable to pay her upon proper demand, as ready money; and when she spoke of money, "either in bank or elsewhere," she meant all her money that was situated similarly to that which she had in bank. She evidently did not use the words "ready money" in their limited sense, and she did not probably mean besides the money deposited in bank simply money kept on hand by her in her house or upon her person; but she meant ready money in bank or anywhere else. Money in the possession of her husband occupying the same house with her, which was at all times subject to call, could with some propriety be called ready money.

While we do not deem this case entirely free from doubt, we think the husband should, under the circumstances, have the benefit of the doubt, and that the bequest should have effect upon the money in his hands.

The judgment of the general term should, therefore, be reversed and judgment given for the defendant, with costs.

All concur, except FINCH, J., who took no part.

Judgment accordingly.

LUDLOW *vs.* LUDLOW.

[36 New Jersey Eq. 597.]

EXECUTION OF WILLS.—ACKNOWLEDGMENT BY WORDS OR ACTS NECESSARY ON TESTATOR'S PART.

Under a statute requiring an "acknowledgment" by testator of a signature to his will made by a third person and a "declaration" of the instrument as his last will, the testator must, by an open expression in words or unmistakable acts, indicate his recognition of the testamentary act in which he is engaged, and of the genuineness of the signature and will presented to the witnesses.

ON APPEAL from a decree of the ordinary reversing a decree of the Orphans Court of Essex county, which admitted to probate a writing purported to be the last will of William A. Ludlow.

The subscribing witnesses alone were examined. The material facts shown are that deceased came to James E. Harrison's store and met his brother James C. Ludlow. The latter came to Harrison and said, "My brother has been making his will and I would like to have you witness it." All three stepped behind a desk when James said, "This is my brother's will; I would like to have you witness it." Deceased then signed the instrument and Harrison attached his name as a subscribing witness. Harrison then went outside the desk to where one Miller stood, in the store, about ten feet distant from the desk, and said, "Mr. Miller, Mr. Harrison has been kind enough to witness my brother's will; now I want you to." Miller went to the desk beside deceased, and signed as a witness. Harrison left the desk, as Miller approached, and went to the place where the latter had been standing. The desk was a low inclosure, about five feet high, with transparent glass at the top. Miller did not see Harrison or decedent sign the instrument. He thought decedent was executing his will, because James C. Ludlow had told him, a few weeks before, that his brother intended to make a will. He said he may have glanced at them, but did not know what they were doing. He could see them and decedent could see him. He said decedent did not say the instrument was his last will, or request him to sign it. Neither did James say anything to him further than detailed. He did not hear anything said inside the desk, and did not know whether deceased heard James request him to sign the instrument. Over deceased's signature, at the end of the will, were the words, "Signed and sealed this Twenty-eighth day of November, in the year of our Lord eighteen hundred and seventy-nine," and over the names of the witnesses, the words "In the presence of."

T. N. McCurter, for appellants.

J. W. Taylor, for respondents.

SCUDDER, J. After careful consideration of the evidence of the subscribing witnesses to this writing, with the desire, if possible, to give effect to the apparent intention of the decedent, I have been unable to reach the conclusion that it should be admitted to probate. The statute of March 12th, 1851, prescribes the formalities to be observed in the due execution of wills and testaments, and unless these appear in some manner, there is no legal sufficiency to devise, pass or bequeath the estate and property of the owner. These requirements differ from those found in the laws of other States, and in the various decisions which have been given, we are likely to be misled, unless these differences, and the exact statements of facts, are most closely observed. It is, therefore, safer and easier to interpret the words and phrases of our own law by the usual rules of construction, and apply them to the facts of each case as they may be presented. In making this examination we are struck with the number and particularity of these forms, as if it were the purpose of the law to protect the person who would dispose of property by will, from the possibility of deception or undue influence. By our law the will and testament (1) shall be in writing; (2) shall be signed by the testator; (3) this signature shall be made by the testator, or the making thereof acknowledged by him; (4) and such writing declared to be his last will in the presence of two witnesses present at the same time, who shall subscribe their names thereto as witnesses, in the presence of the testator. The last clause, relating to the presence of witnesses and the presence of the testator, requires that all shall be together when the signature is made, or the making thereof acknowledged, and when the declaration that it is his will is made. Our earlier statute, passed, March 17th, 1714, required that all wills and testaments to devise lands, tenements and hereditaments should "be made in writing, signed and published by the testator in the presence of three subscribing witnesses." This differs from the English statute of 29 Car. II, c. 3, § 5, mainly in the points that while by the latter the will shall be signed only, our statute requires that it shall be both signed and published; and while, by the construction given to the English statute, an acknowledgment by the testator of his

signature in the presence of witnesses was sufficient, although they did not see him sign his name, such acknowledgment was not by our law regarded as proof of the signing. (*Combs v. Jolley*, 2 Gr. Ch. 625.) These differences are compared and discussed in *Compton v. Mitton*, 7 Hal. 70.

The expression "in presence of witnesses," used in the statute, is there said to be satisfied if the subscribing witnesses were so situated that they could and would naturally see the signing and hear the publishing. The statute of 1851 changed this law, made the acknowledgment of the signature proof of signing, retained the act of publication, in different phraseology, in the presence of two witnesses. The alteration made by substituting "declared to be his last will" for "published by the testator," does not change the requirement that there shall be some word or act by the testator, or in his presence, by which it may be manifested to the witnesses called to attest that the testator knew, and wished them to know, that he was executing his last will and testament. (*Mundy v. Mundy*, 2 McCart. 290; *In re McElwain's Will*, 3 C. E. Gr. 499.)

The words of attestation above the names of the testator and the witnesses in this paper, "signed and sealed, etc.," and "in presence of," are not proof of publication according to the statute. In *Compton v. Mitton* and *Combs v. Jolley*, the court say that the better and safer rule is to require a literal construction of the statute in regard to the publication; and in *Allaire v. Allaire*, 8 Vr. 312, 325, it is said that, if the attestation clause does not contain all the requisites to the making of a will, affirmative proof must be made of its execution in the manner and with the formalities prescribed by the statute. With this burden of proof resting on the proponents, and with the requirements of the statute before us, we must examine the facts of this case to see whether there has been a due execution of this will. In some points it is conformed to the statute. It is in writing; it is signed by the testator; it is attested by the names of two witnesses; but the signature was not made in the presence of two witnesses present at the same time. This is manifest from the facts that Mr. Miller was ten feet away from the place where the signature was made inside the desk;

he was at the time engaged in his work in the store, and his attention had not been specially called at the time to the act in which William A. Ludlow was engaged. Mr. Harrison was near and saw him sign his name, but Mr. Miller testifies that he did not see him writing or subscribing his name to the paper, nor did he know at the time that he was executing his will. He was not then a witness called upon for that purpose. If the writing was legally executed, it must be under the alternative requirement that the making of the signature was acknowledged by the testator in the presence of two witnesses present at the same time. But there was no acknowledgment of the signature, nor any declaration of the testator that the writing was his last will and testament, in the presence of two witnesses present at the same time. This was not done in words, for the only expression of William A. Ludlow after he came into the store, testified to by the witness Mr. Harrison, was his salutation of "good morning" as he entered. Nor does it appear that by any act he designated the signature as his, or the writing as his will, when both witnesses were present. It is left uncertain by the evidence whether the request made by James C. Ludlow, when he went to Mr. Miller and asked him to witness the will, was heard by his brother, who was standing inside the desk. It is not necessary that the testator should, by his own words, acknowledge the signature, and declare the writing to be his last will; this in some cases may be impossible through sickness or bodily infirmity. It may be done in his presence and hearing by another acting for him with his assent. (*Whitenack v. Stryker*, 1 Gr. Ch. 8.) But he must, by some word or sign, clearly indicate his recognition of the testamentary act in which he is engaged, and of the genuineness of the signature and will which are presented to the witnesses for their attestation. The words used in the statute, "acknowledgment" and "declared," demand an open expression, either in words or unmistakable acts; and we have no right to change their obvious meaning, or substitute conjecture for positive proof of conformity to their requirement.

The case of *Inglesant v. Inglesant*, L. R. (3 P. & D.) 172, where the will was admitted to probate, most nearly resembles

this case in the facts, but the English statute of wills (1 Vict. c. 26, § 9) does not require any declaration or publication by the testator in the presence of witnesses, in addition to the acknowledgment of the signature. But in this case the counsel against the will said that in all the reported cases the testator did some act, or said some word during the proceeding, and cited many authorities for his assertion. The late case of *In re Goods of Mary Gunstan*, L. R. (7 P. & D.) 102 (1882), upon another point, is instructive upon the question of the sufficiency of an acknowledgment under the statute, and many previous cases are examined. The court say that not only must there be an acknowledgment, within section 9 of the wills act, but the witnesses must at the time of the acknowledgment see, or have the opportunity of seeing, the signature of the testator. But I have purposely avoided other references to cases decided elsewhere, for reasons already given.

Upon another point presented in the argument of counsel, it is very certain that the affidavit of James E. Harrison, one of the subscribing witnesses, taken before the surrogate, when the will was propounded for proof before him, cannot have the effect claimed for it, of outweighing the evidence of both Harrison and Miller, who describe particularly the manner of the execution of the will. Where there is a perfect attestation clause, supported by the affidavit of one of the subscribing witnesses, the presumption is very strong in favor of the due execution of the will; but where the attestation clause is defective, as in this case, and from the testimony of both witnesses it appears that the will was not duly executed, the customary formal affidavit of one of them on offering the will for probate is entitled to little weight. The case of *Wright v. Rogers*, L. R. (1 P. & D.) 678, cited by the proponents' counsel, was unlike this. There was a full attestation clause, and one of the witnesses had died; the other testified that the will was not duly executed, but the court doubted this evidence, which was opposed by proof, and gave effect to the attestation. In *Croft v. Croft*, 4 Sw. & Tr. 10, where both witnesses swore that the will was not duly executed, and there was no opposing proof, the will was rejected. The full particulars given by both witnesses,

where there is no failure of memory or apparent purpose to deceive, are better evidence that the general affidavit of one witness to the will, and should control the judgment of the court.

The decree of the ordinary will be affirmed and the will admitted to probate, but, under the circumstances, costs of all parties, including a counsel fee of \$100 to each side in this court, will be ordered to be paid out of the estate.

Decree unanimously affirmed.

Necessity for acknowledgment of signature and will by testator.—

The attestation of the witnesses to a will is, primarily, under modern practice, to *the signature* of the testator, and only incidentally to the testamentary character of the writing. See the note to *Flood v. Pragoff*, *ante*, p. 77, as to the necessity of knowledge, on the part of the witnesses, of the character of the paper they attest. The statute of wills expressly provides (1 Vict. c. 26, § 18), "that every will executed in manner hereinbefore required, shall be valid without any other publication thereof." The weight of authority, in England, before this statute, was that no formal publication of the will was requisite. *Ross v. Ewen*, 3 Atk. 156; *Moodie v. Reid*, 7 Taunt. 861; *Doe d. Spilsbury v. Burdett*, 4 Ad. & Ell. 14; 6 M. & G. 396; 10 Cl. & Fin. 840.

But, in several of the United States, statutes provide that there must be a more or less formal publication, by the testator, or some acknowledgment on his part, of the testamentary act, and the courts in several States have so held, independently of statutory requirements.

Statutes in New Jersey, New York, Georgia, California, Arkansas, Nebraska and Louisiana, require publication.

In Mississippi, in a carefully considered case, the formal publication of a last will or testament, by the testator, is held unnecessary. There being no statutory provision on that point in Mississippi, a will in that State may be good, under the statute of frauds, without any words of the testator declaratory of the nature of the instrument, or any formal recognition of or allusion to it. *Watson v. Pipes*, 32 Miss. 451.

In South Carolina, Vermont, Iowa and Wisconsin, a similar doctrine is found in the reported cases. *Verdier v. Verdier*, 8 Rich. L. 135; *Dean v. Heirs of Dean*, 27 Vermont, 746; *Re Hulse's Will*, 52 Iowa, 662; s. c. 1 Am. Prob. R. 352; *Meurer's Will*, 44 Wisconsin, 392.

In New York, under the statute, the courts have been content with very slight acts, and words of publication. *Darling v. Arthur*, 23 Hun, 84; *Von Hoffman v. Ward*, 4 Redf. 244.

Answering "yes" in answer to a question put as to the testamentary intention of the testator, has been held, both in that State and in Illinois, a

sufficient publication. *Reeve v. Crosby*, 3 Redf. 74; *Jamison v. Jamison*, 4 Bradf. 188; *Harrington v. Steers*, 82 Illinois, 50.

And the publication need not be made in the very act of signing, but it is sufficient if done in the course of the transaction, and upon the same occasion. *Re Collins*, 5 Redf. 20.

But an old case holds that mere silent assent is not sufficient. *Heyer v. Berger*, 1 Hoff. Ch. 1.

In Kentucky, the writing, signing and attesting of a will are of themselves a sufficient publication. *Ray v. Walton*, 2 A. K. Marsh. 74; *Swift v. Wiley*, 1 B. Mon. 118; *Soward v. Soward*, 1 Duv. 181.

So in Massachusetts and South Carolina. *Osborn v. Cook*, 11 Cush. 582; *Black v. Ellis*, 8 Hill (S. C.), 68.

An acknowledgment of the signature by the testator has been held a good publication. *Webb v. Fleming*, 39 Ga. 808; *Seguine v. Seguine*, 2 Barb. 385; *Robinson v. Smith*, 18 Abb. Pr. 359.

So a nod by a deaf man. *Gamboult v. Public Adm.* 4 Bradf. 226.

In Arkansas it has been held not necessary to show actual declarations of the testator to establish publication, but from all the attending circumstances, signing, attesting, etc., publication will be inferred. *Rogers v. Diamond*, 18 Ark. 474.

Publication may be established by the testimony of one attesting witness in opposition to the other, the presumption being in favor of a publication. *Auburn Seminary v. Calhoun*, 25 N. Y. 422.

In Pennsylvania, it is sufficient if the will be declared by the testator to be his "act and deed." *Joy v. Kennedy*, 1 Watts & S. 396.

A statement in the attestation clause, that the instrument is the will of the testator, is not a sufficient publication. *Brinkerhoff v. Remsen*, 8 Paige, 488; *Baskin v. Baskin*, 36 N. Y. 416; *Abbey v. Christy*, 49 Barb. 276.

In Louisiana, the answer "yes," in reply to a question as to the testamentary character of the instrument, is not sufficient publication. *McCaleb v. Douglass*, 16 La. Ann. 327.

But a declaration that the instrument contains the last intentions of the testator is sufficient. *Succession of Morales*, 16 La. Ann. 267; *Buntin v. Johnson*, 28 La. Ann. 796.

Formal execution is sufficient publication in Delaware. *Smith v. Dolby*, 4 Harring. 850.

Where the testator was shown to have known the instrument was his will and intended to execute it, and did execute it, and it was duly attested, such a state or case has been held sufficient publication. *Cilley v. Cilley*, 84 Maine, 162; *Beane v. Yerby*, 12 Gratt. 289; *Hogan v. Grosvenor*, 10 Metc. 54; *Brown v. McAllister*, 34 Indiana, 375; *Dickie v. Carter*, 42 Illinois, 376.

See, generally, *Will of Convey*, 1 Am. Prob. R. 90; *Haynes v. Haynes*, Id. 263.

MATTER OF SCHOULER.

[134 Mass. 426.]

LEGACY FOR "CHARITABLE PURPOSES, MASSES, &c."

A direction by testatrix, that a person named shall draw the moneys out of a certain bank and apply them partly to her burial and funeral expenses, and "the residue for charitable purposes, masses, &c.," creates a valid charitable use, and upon the death of the trustee named by the testator the court may appoint his successor.

PETITION in equity for a construction of the will of Catharine Powers, filed by the administrator with the will annexed.

C. H. Barrows, Assistant Attorney General, for the Commonwealth.

P. A. Collins, for the trustee.

MORTON, C. J. The will we are called upon to construe, written by an illiterate person, is as follows: "Boston, Sept. 27, 1857. I the undersigned do authorize the Rev. Thos. Lynch to withdraw the contents of my bank book \$250.¹¹/₁₀₀ no. 93343. The Provident Institution for Savings in the town of Boston after my death being of sound mind, memory and understanding. Said money to be disposed of as follows, part for my burial and funeral expenses and the residue for charitable purposes, masses, &c." If we disregard the punctuation, and supply a few words accidentally omitted, the main intention of the testatrix is sufficiently clear. Being unmarried and without any near kindred, her object was to devote to public charitable purposes, after payment of her funeral expenses, her money deposited in the Provident Institution for Savings, being the whole of her estate. The terms of the bequest clearly manifest the intention to create a trust in the Rev. Thomas Lynch. He is to take the estate, not for his own use, but to be disposed of for the purposes she directs. The omission of the words "in trust" is immaterial, as the intention is clearly man-

ifested that the whole property shall be applied by the legatee for the benefit of other persons than himself. (*Nichols v. Allen*, 130 Mass. 211, and cases cited.)

The trusts defined by the will are that the property is "to be disposed of as follows, part for my burial and funeral expenses and the residue for charitable purposes, masses, &c." Masses are religious ceremonials or observances of the church of which she was a member, and come within the religious or pious uses which are upheld as public charities. (*Jackson v. Phillips*, 14 Allen, 539, 553.) The abbreviation "&c.," equivalent to "etc." or "et cetera," imports other purposes of a like character to those which have been named. *Noscitur a sociis*. It is not the fair construction to hold that it imports that the trustee may apply the property to other purposes not charitable, at his discretion. This is not the necessary or obvious construction, and it defeats the main purpose of the testatrix, apparent in the will, to devote her property to charitable uses. We therefore construe the will as meaning that the trustee is to apply the residue to charitable purposes, masses or other charitable uses.

Though the specific objects of the charity are not named by the testatrix, but are left to the discretion of the trustee, the rights of the heirs at law, or of the Commonwealth by escheat, are devested. Such bequests are upheld as bequests to public charities. (*Saltonstall v. Sanders*, 11 Allen, 446; see also *Jackson v. Phillips*, *ubi supra*; *Nichols v. Allen*, *ubi supra*; *Brown v. Kelsey*, 2 Cush. 243.)

We cannot doubt that, if the Rev. Thomas Lynch had lived until the will was proved, he would have been entitled to the property, to be applied by him as trustee to charitable uses, as directed by the will. He died before the will was proved, and therefore did not qualify as trustee. But this does not defeat the trust. The main object and purpose of the testatrix was to devote her small estate to charity. She nominated her spiritual adviser as a trustee, with power to select the particular objects of charity. The will is very inartificial, but we think that her intention was that the power and discretion to select objects of charity should attach to the trust, and was not personal

to the nominee ; and that it is a case where the courts may properly supply a trustee, in order to carry into effect her main and controlling purpose. (*Harvard College v. Theological Education Society*, 3 Gray, 280, 282 ; *Attorney General v. Andrew*, 3 Ves. 633 ; *Moggridge v. Thackwell*, 7 Ves. 36.)

Archbishop Williams has been appointed as such trustee ; and the administrator with the will annexed, should pay over to him the property, with its accumulations, to be by him applied according to the directions of the will.

Decree accordingly.

See Rhymer's Appeal, 2 Am. Prob. R. 171.

REAGAN vs. STANLEY.

[11 B. J. Lea, 316.]

ENTRIES IN DIARY MAY CONSTITUTE HOLOGRAPHIC WILL.—WILL OF PERSONALTY.

Entries of a testamentary character, made at different dates in a diary in deceased's handwriting, over his signature, may be probated as a holographic will.

An entry of a testamentary character by decedent, in a diary, may be proved as a will of personalty, although not signed by him.

APPEAL from the Circuit Court of Fayette county.

H. C. Moorman and *George Hardin*, for plaintiff.

Stainback & Riddick and *H. P. Hobson*, for Stanley.

COOPER, J. The issue of *devisavit vel non* in this case was tried by the circuit judge without a jury, and found in favor of the proposed will. The defendants appealed in error.

L. E. Stanley, the alleged testator, died on the morning of the 29th of November, 1879, at his residence in the town of La Grange, Tennessee, leaving the propounders and contestants of the will in controversy, who were related to him in the de-

gree of second consins, and citizens of Texas, as his only heirs and next of kin. He was, at the time of his death, about sixty-five years of age, a bachelor, living alone and keeping house with one servant, an old negro woman named Lucy Freeman. He was a justice of the peace, the treasurer of the town corporation, and also treasurer of one or more lodges of secret societies. His estate consisted of about \$4,000 in personalty, and of realty of nearly equal value. The writings propounded as the will of the deceased were embodied in, and formed parts of, a diary or journal kept by him in a large blank book. The entries in the diary are generally dated, commencing May 1, 1878, and ending November 27, 1879, the day before the morning of his death. The diary is closely written, the entries following each other without blank spaces. The proposed will consists of certain of the entries of the diary under date as follows: September 30, 1878, October 3, 1878, February 28, 1879, April 10, 1879, and April 16, 1879. The first, second and fourth of these entries are signed by the deceased, and are the only entries in the diary that are signed. The entries were found by the trial judge to constitute a holographic will, sufficient to pass real and personal property. The third of the specified entries, dated February 28, 1879, which is unsigned, the trial judge found to be a good will to pass personalty. The last entry mentioned was held not to be testamentary.

The entry of September 30, 1878, sets out with a statement that the writer had invited Mary F. Butler, one of the contestants, to visit him, he being then in feeble health from a disease of the heart which eventually caused his death; that she had come, with her son, J. A. Butler, and was then at his house, and that the visit, for reasons stated, was not pleasant to him. The entry concludes thus: "Should I die while they are here, I want Dr. J. J. Pulliam to take charge of what little I have, and give them (Mrs. Butler and son) enough to take them to their home (Bryan, Texas), and not a cent more, for they have got enough for their share. I have a little over four thousand in money, and owe Dr. Pulliam a medical bill, which is every cent I owe. I have a number of relations in Texas. If they are no better than these, I don't want them to have a cent

neither. I have a namesake, L. E. Stanley, living now in Weatherford, Parker county, Texas. If he is all right, he could have it all; if not, none. Old aunt Lucy Freeman, colored, I want her to have one hundred and fifty dollars. She is honest, and has protected my interest more than any one else has ever done, and can live in the room she now occupies as long as she lives, if she wants to do so, and no one is to molest her in her right. And she has a cow and calf which I gave her a few years ago, when the cow was a little calf, because she saved its life. I have not finished my wishes yet, but I am interrupted and must stop. But it is as good as I can say now. And I want what I have said above carried out by all means, if I have any friends to do it." He then signs his name.

In the entry of October 3, 1878, he mentions his intention of leaving home that evening on account of yellow fever, and adds: "I am here now alone except Aunt Lucy Freeman, and if she lives and I die, I want her to communicate with Dr. J. J. Pulliam, and tell him what I have told her. I say this in case I die and she lives to tell him when he comes home. I will leave the book with Aunt Lucy. I sign my name to this as my wish. My lots Dr. P. can do as he thinks best. I want my grave lot put in good condition. I have a plenty to do it with. All my kindred is distant, and they care nothing for me." Entry signed.

The entry of February 28, 1879, not signed, is in these words: "Received a letter from Mrs. L. A. Babb, the first I ever received from her. She is my second cousin. They all hear that my health is bad, and it makes them write. But if I have anything to leave to any of my relations in Texas, I had rather Lucy Ann Babb, who resides now at Wortham, Freestone county, Texas, and L. E. Stanley, my namesake, who lives at or near Weatherford, Parker county, to have what I have than any of the rest. I do not want Mary F. Butler, and her son J. A. Butler, to ever have one cent of my estate, should I leave anything. They got their share beforehand in a way I did not like."

The entry of April 10, 1879, is: "Received a letter from Mrs. Lucy Ann Babb. Charley Harris has received one from

Jas. A. Butler. Don't write to me, but to him to find out how I am making it. If I had 100,000 dollars, Jas. A. Butler, nor his mother not should have one cent of it if I could help it. They were to see me last summer, and I soon found out that all they wanted was what little I had. They cost me between two and three hundred dollars. They are very little kin to me any way, only second cousins. Can't or must not have one cent of my estate when I die, and I want my friends to see (to) it, if I have any friends here." This entry is signed.

The last entry, under date of April 10, 1879, which was held not to be testamentary, speaks despondingly of the writer's health, repeated that he owes no one anything except Dr. Pulliam, expresses a desire to settle this one debt, and adds: "Don't want to give my administrator any trouble when I am dead, only to hand over what little effects I have to the parties designated."

The judgment of the trial court is that the cause came on to be heard, and the court finds "the following paper writing is the last will and testament of L. E. Stanley, deceased, in words and figures following, to wit, it being the first four entries in the diary of the said L. E. Stanley which the proponents offered to set up as his will," setting out the entries in *hæc verba*. "And the court finds the entries of date September 30, 1878, October 3, 1878, and April 10, 1879, as set out above, is the holographic last will and testament of L. E. Stanley, deceased, as to both the realty and the personalty mentioned therein, all of said entries being signed by him. But it finds that the entry of date of February 28, 1879, set out above, is the last will and testament of L. E. Stanley for his personalty only, it not having been signed by him. But the court does not undertake to determine whether any of the parties in interest take anything under said clause, but only that it is testamentary in its character. And the court further finds the fifth and last entry in the diary of said L. E. Stanley, deceased, which proponent endeavor to establish as a part of the will of said L. E. Stanley, deceased, and which is in the words and figures following, to wit (setting it out), is no part of said last will and testament. And the court doth further find that all of the

above given entries, and every part thereof, are in the handwriting of the said L. E. Stanley, deceased; that said handwriting was generally known by his acquaintances, that it was proven by four credible witnesses, and that the book wherein said entries were made was found among the valuable papers of said L. E. Stanley, deceased, after his death, and that the first four entries set out above are the last will and testament of said L. E. Stanley, deceased. It is therefore considered by the court," etc.

The judgment is not a special finding of all the facts, but only of those facts essential to the validity under the statute of a holographic will, and of a will of personalty. It does not undertake to state any of the principles of law which should govern in the finding of the facts. Under these circumstances, the findings of fact are conclusive if there is any evidence to sustain them.

By the Code, sec. 2163, a paper writing appearing to be the will of a deceased person, written by him, having his name subscribed to it, or inserted in some part of it, and found, after his death, among his valuable papers, or lodged in the hands of another for safe-keeping, shall be good and sufficient to give and convey lands, if the handwriting is generally known by his acquaintances, and it is proved by at least three credible witnesses that they verily believe the writing and every part of it to be in his hand.

"A last will," says Swineburn, "is a lawful disposing of that which any one would have done after death." It is a voluntary disposition of property, in a mode recognized by law to take effect after death. All that is required to constitute "a paper writing appearing to be the will of a deceased person," within the meaning of the statute, is that the writing should purport to be a disposition of the writer's property after his death. Each of the entries quoted above, which is signed by the deceased, does either undertake to dispose of property of the writer after his death, or to control its disposition. Each entry, therefore, appears to be a will, and falls within the statute so far as this point is concerned, whether the language used be sufficient for the purposes intended or not, which is a matter of

construction by the proper court after the testamentary character of the instrument is determined. The intention to confer some power or control on Dr. Pulliam, to give a bequest and legacy to Lucy Freeman, and to put his grave lot in good condition, after the writer's death, is clear.

It is conceded by the learned counsel for the appellants, that the evidence is sufficient to sustain the trial judge's findings of all the other requisites of the statute as to the three entries signed by the deceased, except, he insists, the essential requisite that they were found among the valuable papers of the deceased. But the entries are embedded in the diary of the deceased, continuously kept by him, and in which he had made an additional entry, according to the proof, on the night before his death. Valuable papers, within the meaning of the statute, are not papers having a money value, but only such as "are kept and considered worthy of being taken care of by the particular person." (*Marr v. Marr*, 2 Head, 306.) Entries of daily transactions, whether on separate sheets of paper or in book form, preserved by the writer, and which the proof shows he directed his servant to deliver to the person selected by him to manage his estate after his death, would be valuable papers. If the testamentary papers in controversy had been written on separate sheets of paper, and deposited by the writer within the leaves of the book in which the diary was kept, it would scarcely be contended they would not be found among his valuable papers. For a stronger reason they must be so considered if actually written in the book itself and as parts of its entries. Moreover, the proof shows that this book was in the hands of the deceased on the night before his death, and was found, with other manuscript books of account in which the deceased kept his accounts as treasurer of the town of La Grange, and of certain secret lodges. These books were all lying upon a shelf of the washstand, within a step of the bed of the deceased, and where he seems to have been in the habit of keeping them. On the second day before his death, he had called his servant's attention to this book, and directed her to hand it to Dr. Pulliam in the event of his own death, which his diary shows he was daily

anticipating. The proof is sufficient to sustain the finding of the trial judge on the contested point.

It is next insisted that it was error to adjudge that some of the entries were entitled to probate as a holographic will, and that an intermediate entry was entitled to probate as a will of personalty only, and then adjudge the four entries to be one will. This objection seems to be rested on the idea that a holographic will would be of a higher grade of solemnity than an informal will of personalty, and could not be revoked by the latter. But, with the exception of a nuncupative will under the provisions of the Code, sec. 2167, every will validly executed and published according to law must, to the extent of its valid dispositions of property, be treated as of equal grade. A later will, unless otherwise intended, is only a revocation of the provisions of a former will in so far as it makes a valid disposition of the same property. Any will known to the law which is valid as to particular property will to that extent revoke a former will, no matter how executed. It was so held in *Greer v. McCrackin*, Peck, 301, where a formal will attested by witnesses was changed as to certain personalty by an alteration of a bequest made by a third person under the direction of the testator without the attestation of witnesses. Whether that decision was correct in so far as it set up the alteration as a valid will may admit of doubt in view of subsequent decisions. (*Suggett v. Kitchell*, 6 Yer. 425 ; *Johnson v. Fry*, 1 Cold. 101.) But there seems to be no reason to doubt its correctness as to the effect of the alteration if established as a will. A later holographic will would *pro tanto* revoke a prior will attested by witnesses, and a subsequent informal instrument, neither signed nor witnessed, if established as a will of personalty, would to that extent revoke both the preceding wills. All wills are of equal grade or solemnity if duly probated according to law.

A more difficult question is whether the unsigned entry of February 28, 1879, is sufficiently established by the proof as a will of personalty. The presumption of law is certainly against the testamentary character of a paper not executed by the party, and it is a circumstance against this paper that it is between entries of a testamentary character which are signed. On the

other hand, a paper complete in itself as to its provisions, which shows on its face the intention of a party that it shall take effect after his death, may be set up as a will, although neither written nor signed by the party. (*McLean v. McLean*, 6 Hum. 452.) And a will written by the testator's own hand, although not signed by him, nor attested by witnesses, is good as to personalty, provided the handwriting be sufficiently proved. (*Suggett v. Kitchell*, 6 Yer. 429.) The direct point was raised by the facts in *McCutchin v. Oehmig*, 1 Baxt. 390, but apparently overlooked, because doubtless it was known that the personalty would be exhausted in the payment of debts, and the effort was to set up the instrument as holographic. The entry in controversy is shown by four witnesses to be entirely in the handwriting of the deceased. And the servant of the deceased testifies that on Wednesday night before his death on Friday morning, the deceased brought the book to her in which the entries are written, and told her to give it to Dr. Pulliam, and it would tell him what to do. We cannot say that there is no evidence to sustain the finding of the trial judge on this branch of the case.

Affirm the judgment.

FRAZER'S ACCOUNTING.

[92 New York, 239.]

BEQUEST OF "ALL OF THE HOUSEHOLD PROPERTY IN THE DWELLING."—EXEMPTING ADDITIONAL PERSONALTY FOR WIDOW.—BURDEN OF PROOF ON ACCOUNTING.—"REPAIRS" OF BURYING LOT.—PAYMENT OF BARRED CLAIMS.

A bequest to the widow of "all of the household property in the dwelling house," includes the coal and wood provided for the use of the family, and a shot-gun in the absence of proof that the latter was not kept for the defense of the home. A bequest to the widow of all testator's household property and the use of his house do not prevent appraisers setting apart as exempt, for her use, a horse, phaeton and harness.

Where executors paid a claim arising upon a contract with deceased and produce a voucher therefor, the burden upon an accounting is on contestants to show the debt was not a just one.

Under an authority to executors "to expend a sum not exceeding \$2,000 in the repair" of a burying lot, they may erect a sarcophagus, exchange a monument on the lot, erect headstones, and replace coping, not expending more than the sum specified.

Executors who pay to a mother a claim by her deceased son against the estate for wages, although she is not his administratrix, will not be charged therewith if the statute of limitations has barred the claim.

APPEAL from a judgment of the general term of the Supreme Court in the fourth department, affirming a decree of the surrogate of Livingston county upon the final accounting of the executors of Harlon W. Wells, deceased.

The will gave certain legacies, and continued : " All the rest and residue of my estate, both real and personal, I give, devise and bequeath to my beloved wife, Frances C. Wells, Henry M. McDonald and Willard Wells McDonald, to be equally divided between them ; I do hereby authorize and direct my executors, hereinafter named, to sell the property in the village of Caledonia, and the farm north of said village, on such terms as they may think best. The McDonald farm is not to be sold, and my brother, Horace Wells, is to have his support out of my said property for and during the term of his natural life, and I hereby direct my executors, hereinafter named, to reserve in their hands sufficient thereof for that purpose, and to apply the same for said purpose. I hereby authorize and direct my executors, hereinafter named, to expend a sum not to exceed \$2,000 in repair of the burying lot of W. H. Smith, and that my body should be kept in a receiving vault in Le Roy until such repairs can be made. I also give, devise and bequeath to Mrs. Carr, wife of William Carr, of Caledonia, the house and lot where she now resides, and direct my executors to deed the same to her. I likewise give, devise and bequeath to my wife, Frances C. Wells, all of the household property now in my dwelling-house, in the village of Caledonia, and the use of said dwelling-house for and during the term of her natural life, and direct that said dwelling-house shall not be sold during her said life."

The facts sufficiently appear in the opinion.

Angus McDonald, for appellants.

Lucius N. Bangs, for respondent.

FINCH, J. The provision of the will giving to the widow "all of the household property in the dwelling-house" is broad enough to include the coal and wood provided for the use of the family, and also the shot-gun, in the absence of proof, showing that it was not kept for the defense of the house. (*Dayton v. Tillou*, 1 Rob. 21; *Cole v. Fitzgerald*, 1 Sim. & Stu. 189.) Such may have been its use and purpose, and we are not required to presume the contrary from any fact given in evidence. The ruling of the surrogate in these respects was correct.

The appraisers set apart as exempt, and for the use of the widow, a horse, phaeton and harness of the value of \$150, which it is now said were not "necessary," since she took under the will all the household property, and the use of the house for life. If we could so decide, where the testator had given to the widow the use of all his real and personal property, except a legacy due him (*Peck v. Sherwood*, 56 N. Y. 615), we cannot say it where only the household property is given. In such a case "other personal property" is available for the exemption, and may be necessary. When the appraisers have so determined and the surrogate approved, there is no basis left for us, unless upon very different facts, on which to found a reversal of such conclusion.

Certain payments of alleged debts against the estate are questioned, and the executors sought to be charged with their amount. All of them are shown to have been honest debts, and honestly due. No adequate reason is given why the executors should have suspected their justice, or doubted the propriety of their payment. What is said amounts only to an assertion that the executors might possibly have resisted them with success, and were bound to make the effort. One of these claims was that of Mullin. It was based upon an alleged contract with the deceased, and presented and sworn to in the

ordinary manner. The executors having paid it and produced their voucher, the burden was on the contestants to show that it was not a just debt of the estate. They showed nothing of the kind. All the proof is the other way, and the sole point of their criticism is that the executors could have kept out proof of the contract by resisting the claim, and shutting out Mullin as a witness to personal transactions with the deceased. But that does not follow. If the executors had defended, proof of the contract might have come from some other source. And in any event there is evidence of the value of Mullin's services reaching quite to the level of his claim. We think Mullin was a competent witness. He was not a party, nor did the executors derive any title or interest from him. They neither owned the debt, nor asserted any title to it. As the contestants did not establish that the demand was unjust, and not a debt of the estate, the payment by the executors was properly allowed.

The objection to the payment made Mrs. Tierney, for the wages of her son Peter, appears to have been that she was not authorized to receive them, and they were outlawed. The services ended in March, 1871. Peter was then eighteen. The statute did not begin to run against him until 1874. (Code, § 396.) The payment was in 1879. Peter had died at some time previous, but when we do not know. His father died in November, 1877. If the wages belonged to the father it is claimed they were outlawed; but if they belonged to the son it is not claimed that they were barred by the statute, but only that the mother, not having been appointed administrator, could not lawfully discharge the debt. But the estate of Wells has suffered no wrong. It cannot be made to pay the debt a second time, for the statute is a bar. It was an honest debt, and has gone to the benefit of those entitled. The executors should not be charged with it unless by their act the estate has suffered some loss. It has suffered none and can suffer none; and we ought not to punish executors for omitting a precaution which would have been wise, but which time has rendered unnecessary for the safety of the estate committed to their care.

The third payment questioned was made to the widow. The

fact that the testator had \$380 of her money and loaned it in 1869, and afterwards included the amount in a mortgage taken to himself, is not disputed. But the statute of limitations is again relied on. The husband was allowed by the wife to retain the money. There was no conversion by him for which trover could have been maintained. The transaction amounted to a trust or a deposit. Originally the money was loaned to McPherson, and the notes taken in the name of the wife. In February, 1870, McPherson wanted more money on his bond and mortgage, and the testator loaned it, including in the security taken in his own name the debt due his wife. Whether this was done with the knowledge and assent of his wife we do not certainly know, but assuming that it was, unless she loaned him the money, which is not shown, he held the mortgage to the extent of her money in it as her agent or trustee. If she so consented, which is most probable, she became in equity the owner of a proportionate part of the mortgage, but was not entitled to receive the money until it was paid, and could maintain no action until her right was in some manner denied. But we are asked to presume that she did not consent in order to make her husband a wrong-doer, and guilty of a conversion of the money, and so set running the statute of limitations, and outlaw the demand before the death of the testator, and thus make the executors liable for an improper payment. The burden was upon the contestants to prove their case. We cannot relieve their failure by presuming that the husband was guilty of a conversion of his wife's money, when it is both possible and probable that he merely invested it in his own name for her benefit, and with her knowledge and consent. The relation of the parties to each other, their conduct, and all the facts disclosed indicate such to have been the truth of the transaction, and, therefore, that the claim of the wife was just, and not barred by the statute of limitations. On that basis interest was payable to the widow because earned by the investment of her money and received by the testator for her.

The will directed the executors to expend a sum not exceeding \$2,000 in the repair of the cemetery lot of W. H. Smith,

who was testator's father-in-law, and that his body should be kept in a receiving vault in Le Roy until such repairs be made. After his death a sarcophagus was erected upon the lot at a cost of \$500, and his remains placed therein. After this, the monument on the lot was exchanged for a better one, headstones to graves erected, and coping replaced at a further cost of \$935 05. This last expenditure is objected to on the ground that a new monument was not "in repair" of the lot, and there being a sarcophagus there was no need of a monument. It can scarcely be necessary to review a discretion exercised by the executors and kept within the limit fixed by the testator himself. What was done was plainly within the authority of the will and was reasonably and fairly executed.

Certain repairs were put upon the homestead amounting to \$320, which was done at the request of the widow and Henry McDonald. One-half was, therefore, charged to each. Under the will the widow had a life estate in the homestead. The remainder in fee went to Henry and Willard McDonald. The repairs benefited both the life estate and the remainder. The executors were not bound to make them so far as the facts disclose. What they did was to advance to the widow and Henry \$320 out of the estate, at their request, which was expended for their benefit and in accordance with their direction. Why they should not be charged with what they had, and why the executors should personally pay one-third of it, we are unable to perceive.

Finally, it is objected that the widow was not entitled to dower because the provisions for her benefit under the will were accepted by her, and dower was excluded by the manifest intention of the testator derived from the scope and tenor of the will. No trust estate was vested in the executors. They had simply a power of sale, with no right to rent or lease, and no control over the rents and profits. No duty relating to the real estate was imposed upon them except to sell and convey. Dower, therefore, was not excluded by the creation of a trust estate inconsistent with it, vested in the executors. (*Savage v. Burnham*, 17 N. Y. 561; *Tobias v. Ketchum*, 32 Id. 327.) The provision giving the rest, residue

and remainder of his property to the widow and the McDonalds is not inconsistent with dower, for it relates to the division of his estate, and does not purport to dispose of hers. The two may stand together. The intention manifested in the will was not an equal division of all his property among the three, as in *Chalmers v. Storil*, 2 Ves. & Bea. 222, a case shaken by subsequent criticism. (*Gibson v. Gibson*, 17 Eng. L. & Eq. 349.) But the equal division aimed at is of a residue which may well be deemed the remainder of the property subject to the dower right. (*Havens v. Havens*, 1 Sandf. Ch. 324; *Mills v. Mills*, 28 Barb. 456.) The repugnancy, therefore, which drives the widow to an election must come, if at all, from the provision for the support of testator's brother, those directing a sale, and that devising a house and lot to Mrs. Carr. It is conceded that the support of the brother was simply charged upon the McDonald farm, which was not to be sold. The existence of such a charge does not necessarily exclude the widow's dower in the same land, especially since the executors are also directed to reserve in their hands sufficient of testator's property for the purpose of that support. The devise to Mrs. Carr, and the direction to sell and convey a part of the real estate, do not necessarily conflict with the right of dower in the present case. (*Jackson v. Churchill*, 7 Cow. 287; *Havens v. Havens*, *supra*; *Fuller v. Yates*, 8 Paige, 325.) Directions for a sale may be so expressed, and the purpose to be answered of such peculiar character, as to indicate an intention to exclude dower. (*Vernon v. Vernon*, 53 N. Y. 362.) But no unusual or peculiar state of facts exists in the present case to compel an inference that the property directed to be conveyed was to pass free and discharged from the widow's dower. There is enough in the will to produce hesitation and reflection, but not enough to establish that clear repugnancy, that manifest intention which is alone sufficient, in the absence of express words, to drive the widow to her election.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

CRABB vs. YOUNG.

[92 New York, 56.]

LIABILITY OF TRUSTEES.—EXEMPTION EXCEPT FOR WILLFUL NEGLECT.—LOANS ON UNINCUMBERED REAL ESTATE.—UNPAID TAX.

A provision in the will, exempting trustees from liability "for any loss or damage that may happen to my estate except the same shall occur or take place from their own willful default, misconduct or neglect," protects them against losses by improvident or careless investment. There must have been a willful and intentional disregard of the rules of prudence.

If trustees act in good faith in making investments, subsequent events which they could not foresee or control, operating to depreciate the value of the securities, do not render them liable to make good the loss to the estate.

An unpaid tax is not an incumbrance within the meaning of a direction in a will to trustees to invest in bonds and mortgages "on unincumbered real estate."

CROSS APPEALS from a judgment of the general term of the City Court of Brooklyn, affirming a judgment at special term. The opinion states the facts.

Nathaniel C. Moak, for plaintiff.

Matthew Hale, for defendants.

RUGER, Ch. J. This case comes here on cross-appeals from the judgment of the general term, affirming a final judgment rendered in the City Court of Brooklyn. Each party, by appropriate provisions contained in their respective notices of appeal, seeks also to review an interlocutory judgment previously rendered in the action.

The circumstances out of which this action arose are as follows: Isaac Young died before July, 1868, having previously made his will, and leaving a considerable estate to his five children, Isaac H., Robert B., John L., William A. and Margaretta Young, the plaintiff, the defendants Isaac H. and Robert L. Young were made executors. The estate consisted of four pieces of real property, some of which were unproductive, and personal property of the value of about \$80,000.

The will and codicils made provisions which may be stated

concisely as follows: To each of the defendants was devised one-fifth of all of his property absolutely. The shares of the other three children, each consisting of one-fifth of the estate, were devised to the defendants in trust to invest and pay over the income arising therefrom to the respective devisees during their natural lives, and the share to the income of which the plaintiff was entitled, was upon her death to go to her heirs and next of kin.

The executors were empowered to sell, lease and dispose of, or to partition the real estate, and they were directed to invest the moneys accruing from plaintiff's share of the proceeds in bonds, secured by mortgages upon unincumbered real estate, situated in the State of New York, and to keep said trust funds at all times distinct from the other trust estate created by said will. It was further provided that said executors should not be answerable for any loss or damage happening to the estate, except such as occurred from their willful default, misconduct or neglect, and that each of said executors should be liable to account only for the moneys which come into his individual hands. The plaintiff had no parents or children living, and in the event of her decease, her brothers would apparently become her heirs at law.

This action was commenced in March, 1879, against the executors, and sought substantially these measures of relief: *First.* To recover of the defendants the sum of \$10,000 for loss of income, to which the plaintiff claimed she was entitled, by reason of an alleged willful and fraudulent delay of said executors and trustees in selling the real estate left by the testator, and adding one-fifth thereof to the plaintiff's trust fund. *Second.* To cause the defendants to reimburse to the plaintiff's trust fund the sum of \$8,000, alleged to have been imprudently loaned by them in two several mortgages of the respective amounts of \$5,000 and \$3,000, and which are claimed to have resulted in an apparent loss to the trust fund. *Third.* To obtain the removal of the defendants as trustees of said estate. The grounds for this claim of relief do not appear in said complaint, except inferentially they may be presumed to be

founded upon the allegations of misconduct thereinbefore described.

The answer consists : *First*. Of what may be briefly termed a general denial. *Second*. A former adjudication of all matters of difference between the parties by the surrogate of the proper county in October, 1874. *Third*. A former adjudication of all of the alleged causes of action arising out of the delay of the executors in selling said real estate, in an action in the City Court of Brooklyn, in which final judgment was rendered in June, 1876. *Fourth*. The statute of limitations. Under this state of the pleadings, a trial was had at special term which resulted in a judgment for \$1,826 69 and interest in favor of plaintiff for defendants' delay in selling real estate, also removing them as trustees of plaintiff's share in said estate, and appointing another trustee, and requiring Isaac H. Young to restore to said trust fund \$8,000 and interest thereon, on account of the said alleged improvident investment, and gave the plaintiff's attorney an allowance of \$1,500 with costs, to be collected personally out of the defendants.

Upon appeal to the general term of the City Court, taken by defendants, that court reversed so much of the judgment of the special term as awarded \$1,826 69 and interest to the plaintiff, and affirmed the remainder thereof, and remitted the parties to the special term to carry out certain special provisions contained in the judgment. After an appearance by the parties before the special term, and their compliance with the special direction required by what was termed the interlocutory judgment, final judgment was rendered at said special term to the effect above described, which was on appeal affirmed at the general term. From this judgment both parties appealed to this court, the plaintiff from so much of said interlocutory judgment as reversed the award to her by the special term of \$1,826 69 and interest, as damages for defendants' delay in selling real estate, and the defendants from the rest of said judgment.

Appropriate exceptions have been taken to raise each of these questions, and their consideration requires us to examine

the findings of the court below and such evidence as bears legitimately upon them.

On the trial the plaintiff put in evidence a judgment of the City Court of Brooklyn in an action wherein she was plaintiff and Isaac H. Young, Robert B. Young, John L. Young, William A. Young and others were defendants. The complaint in the action, among other allegations, charged Isaac H. and Robert B. Young with willful and fraudulent misconduct in the management of the estate of Isaac Young, deceased, and delay in selling the real estate, whereby she claimed that she had suffered great damages in the loss of income therefrom, and demanded judgment that the executors be directed immediately to sell said real estate and invest her share thereof, and that they pay over to her the income which they had and also that which they might with due diligence have received from the one-fifth part of said estate, and that some suitable person be appointed to take charge of that part of the funds in which she was interested, or that the trustees give security for the performance of their duties as trustees. The defendants Isaac H., Robert B., John L. and William A. Young, each answered said complaint substantially denying the allegations of improper conduct therein charged against Isaac H. and Robert B. Young, and alleged that there had been no intentional delay in selling said real estate, that constant efforts had been made to effect a sale thereof, but the same had been ineffectual for the reason that the market for the sale of real estate had been so depressed that it could only be made at any time previous thereto except at inadequate prices with great loss to all of the parties interested.

Upon the issues thus formed a trial was had between these parties and judgment rendered therein in June, 1876, whereby the trustees were directed to sell said real estate at public auction within five months from the entry of said judgment, and proceed to divide said estate into five equal parts, keeping the trust funds separate and distinct from each other, and pay over the income of one of said shares, after deducting all proper and necessary charges thereon, to said plaintiff. Extra allowances were ordered of \$2,000 to the plaintiff and \$1,250

to the defendants Isaac H., Robert B. and John L. Young, to be paid out of the estate. The judgment also suspended Robert B. Young on the ground of his insolvency from acting as trustee until the further order of the court. The court below on the trial of the present action found the further fact that all of said lands were sold by the executors in the year 1878 for the aggregate sum of \$15,950, and that the delay in the sale thereof after the said judgment in June, 1876, was consented to by plaintiff upon the request of defendants. It appeared in evidence that she received a pecuniary consideration from defendants for such consent. Immediately on the heel of this former judgment and apparently with a view of complying with its provisions, the defendants set apart securities of the appraised value of \$21,673 97, and executed a written declaration stating that they held such securities in trust for the plaintiff under the provisions of the will of Isaac Young, deceased. This selection of securities was approved as to character and amount by the plaintiff's attorney in that and also the present action.

Upon these facts we are of the opinion that there was no evidence in the case which authorized the court below to charge the defendants with damages occasioned to the plaintiff on account of the delay in selling the real estate in question and investing its proceeds, neither do we think that any evidence in relation to such delay was competent or material as the basis of a charge against these defendants of improvidency or willful or fraudulent misconduct in the management of such trust estate. So far as the charge of misconduct related to the period subsequent to the former judgment the court find that the delay was expressly authorized and approved by the plaintiff, and there is nothing in the case to show that it was not a wise and prudent measure. In fact the other four joint-owners, two of whom were *cestuis que trust*, with interests identical with those of plaintiff, approved the management of the trustees and voluntarily paid the plaintiff a considerable sum to induce her to consent to such delay.

The determination of the former action by the judgment of the city court was an adjudication as to all of the questions

litigated therein and was conclusive upon the parties to this action until reversed. It is, therefore, seen that that action adjudicated the question that, upon the facts existing at the time of such judgment, the plaintiff was neither entitled to recover damages for delay in selling said real estate, or to a judgment removing the defendants from their trusteeship under the will. That judgment shows that the court passed not only upon the question of the amount of the fund to the income from which plaintiff was then entitled, as was held by the general term, but also upon the question of the removal of the defendants. In fact they did suspend one of said trustees upon the ground of his insolvency, and as to the other trustee they directed him to proceed and execute the duties of his trust, thus impliedly refusing to remove him from his position as trustee.

These questions were all legitimately raised by the pleading in that action, and were either actually decided or necessarily determined in arriving at the conclusion embodied in the judgment. We, therefore, affirm the decision of the general term, holding that the plaintiff was estopped by that judgment from claiming or recovering damages on account of the delay exercised by the executors in disposing of the testator's real estate.

The only finding of fact in the court below charging the defendants with willful misconduct in the management of said estate related solely to their action in delaying the sale of said real estate, and we must assume that the judgment of removal was based largely if not wholly upon this finding. We see no reason why the former adjudication was not as conclusive of the question of defendants' misconduct as it was upon the question of delay in selling the real estate, and we are, therefore, of the opinion that the court below erred in directing the removal of the defendants from their trusteeship unless some other sufficient ground therefor arising subsequent to June, 1876, appears in the evidence.

It is claimed that the defendants were also guilty of misconduct in the year 1876 in relation to the investment of trust funds in bonds and mortgages upon real estate in the city of Brooklyn. The complaint does not allege the carelessness or imprudence of the defendants in respect to such investment

to have been "willful," neither do the findings of the court below thus characterize the action of these trustees. It is quite clear that they cannot be held liable to replace the moneys lost through even an improvident or careless investment, unless they have acted willfully and have intentionally disregarded the rules which control and regulate the action of prudent and careful men in conducting their own business affairs.

The will of the testator expressly exempts them from liability "for any loss or damage that may happen to my estate, except the same shall occur or take place from their own willful default, misconduct or neglect." The testator had an absolute right to select the agencies by which his bounty should be distributed and to impose the terms and conditions under which it should be done. He well knew the character and qualification of those whom he selected as his trustees, for they were his own children, and while they were engaged in the performance of a lawful duty which he intrusted to them, the court has not the right to increase the measure of their responsibility or impose obligations from the burden of which he has in his will so carefully protected them. We think, therefore, in the absence of any finding to the effect that the conduct of the defendant Isaac H. in making such investments was willful or fraudulent, that the court below erred in holding that he was liable to replace the amount of such investment in the trust fund.

There still remains to be considered the question as to whether the conduct of these defendants in dealing with this estate since June, 1876, has been so negligent, careless and improvident as to justify the claim that it was willful and authorized their removal from the trusteeship and the appointment of another in their place.

Trusts of property are generally created for the benefit and support of the young, helpless and inexperienced, and depend largely for their proper administration upon the honesty and capacity of those to whom they are confided. From the fact that those who are most immediately interested are usually incapable of properly guarding their own interests, and must necessarily depend so much upon the good faith of others, the

court will guard their rights with jealous care and scrutinize closely the conduct of trustees with the view of holding them to a high degree of responsibility in the management and control of trust estates. But while trustees are thus held to great strictness in their dealings with the interests of their beneficiaries, the court will regard them leniently when it appears they have acted in good faith, and if no improper motive can be attributed to them, the courts have even excused an apparent breach of trust, unless the negligence is very gross. (*Perry on Trusts*; *Lansing v. Lansing*, 1 Abb. Pr. [N. S.] 288) We would not in the least degree impair the force of the well-settled rules on that subject or encourage laxity in the conduct of trustees in the management of trust estates, but in this case and with reference to these defendants, we think the court below have gone beyond any established rule and have held them to a stricter degree of responsibility than ought generally to be required from executors and trustees. It does not appear from the evidence given on the trial that any loss has actually occurred to the income from the trust fund in consequence of these investments; indeed it seems quite probable that no loss will even eventually occur to the fund itself.

Although the defendants in the exercise of a permissible discretion (*Chesterman v. Eyland*, 81 N. Y. 398; *Orniston v. Olcott*, 84 Id. 339), and in order to avoid eventual loss, have felt obliged to foreclose the mortgages and take the title to the real estate upon which they were liens, there has nothing yet transpired to show that this proceeding will result in any loss. In fact it was shown upon the trial that upon this investment of \$8,000, the trustees are now in the receipt of rents amounting to about \$800 annually, and with a reasonable probability that the property may be sold for enough to cover the entire amount of both of the loans complained of. The presumptions against careless or imprudent conduct on the part of these defendants in the investment and management of this fund are natural and almost irresistible. They are apparently the natural heirs of the plaintiff and presumptively will be entitled to the trust fund after the termination of her life estate. They, therefore, have every interest in preserving instead of wasting

it. They are required by the will to invest the funds in a limited way, viz., on bond and mortgage upon unincumbered real estate situated in the State. They invested these moneys in strict accordance with their authority, and at a time when from the abundance in the money market such securities were scarce and difficult to obtain.

The evidence produced by the plaintiff on the trial in support of the charges of misconduct on the part of the trustees in making the investments in question, seems entirely insufficient to sustain the findings. Except the strong apparent desire of the plaintiff to direct and control the management of the trust estate, and the refusal of one of the defendants when giving evidence in this case, to say that he would take the two lots in question and replace their cost in the trust fund, there is but little proved or alleged against the defendants.

The only witness produced by the plaintiff upon the value of this property, testifies that the McComb street lot and building upon which the \$5,000 loan was made was worth in 1876 from \$5,100 to \$5,400, and that the lot and building on Ninth street would have cost about \$4,000 in 1876. It further appears that the loan on the McComb street house was made by the purchase of an existing mortgage thereon, which was at the time of the loan paid down from \$7,500 to \$5,000 to meet the amount which the defendants desired to invest. In opposition to this evidence, the defendants proved by a number of capable and apparently experienced witnesses that the McComb street house was worth from \$9,000 to \$10,000 in 1876, and that the officers of a banking institution in Brooklyn at the same time, with the loan in question, loaned \$5,000 on a mortgage upon a similar house in the same block.

The Ninth street house was by the same witnesses shown to be worth in 1876 from \$4,600 to \$6,000 and rented for \$350 per annum. Upon this evidence we cannot see any ground for imputing a want of prudence to the defendants in making the loan in question, much less bad faith in the management of this estate. If the defendants acted in good faith in making these loans, subsequent events which they could not foresee and over which they had no control, operating to

depreciate the value of these securities, would not render them liable to make good such loss to the estate. Such a rule would require a trustee to forecast the future with infallible accuracy, and in case of failure to do so, make him responsible for the consequences, even though he exercised the greatest caution and prudence in making investments. Under such a rule no prudent man would or could safely undertake the management of a trust estate, and it would be difficult to obtain honest and reliable men to accept what is a very necessary but is often a thankless and troublesome duty.

We apprehend the court below mistook the actual position of these parties and did not sufficiently realize that the defendants were by the testator exclusively intrusted with the duty of managing and controlling this fund. The testator deliberately excluded the plaintiff from the performance of this duty, and conferred it upon the defendants, and when she seeks to oversee and supervise the management of the trust fund, she exceeds the power which the will confers upon her. While it would not be improper that these trustees should consult the plaintiff with reference to the investment and management of such fund, yet they were under no legal obligation to do this, and their neglect to do so is not misconduct or conclusive evidence of carelessness or bad faith. It was suggested on the argument as a reason why the defendants should be removed from their trusteeship that their interests were hostile to those of the plaintiff. We think this is not necessarily so, but even if it was, the testator, who knew the relations of the parties and their opposing interests, if any such there were, chose to impose this trust as the condition upon which he gave the plaintiff an interest in his estate, and she can acquire that interest only through an acquiescence in the terms which accompany the gift. It is also claimed that the existence of an unpaid tax of about \$160 upon one of these lots at the time of the loan in question was a violation of that provision of the will which required investments to be made in mortgages upon unincumbered real estate. Although an unpaid tax is doubtless an incumbrance on the land upon which it is laid, yet we think it was not such an incumbrance as was in the contempla-

tion of the testator when he inserted this provision in his will. Not only was its amount trivial in comparison with the value of the lot, but there is comparatively but a short time in the course of a year when a tax upon real estate is not either levied or impending over it, and to call a tax an incumbrance within the meaning of this provision would give it an unreasonable and impracticable construction. (*Croft v. Williams*, 88 N. Y. 384; *Chesterman v. Eyland*, 81 Id. 398.)

The views which we have expressed in regard to this case render it unnecessary to discuss the effect of the adjudication before the surrogate in 1874, or as to whether all of the parties interested in the trust fund and entitled to be heard on the question of a change of trustees are now before the court.

The interlocutory judgment of the general term reversing the judgment of special term awarding \$1,826 69 and interest to the plaintiff should be affirmed. And the judgments of general and special terms removing the defendants as trustees, and appointing another in their place, and requiring the defendant Isaac H. Young to restore the sum of \$8,000 and interest to the trust fund, should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment accordingly.

INGERSOLL vs. INGERSOLL.

[36 New Jersey Eq. 127.]

GIFT REQUIRING PERSONAL OCCUPATION OF HOUSE BY WIDOW.

A provision by testator that it was his wish that his wife should "have the privilege of occupying so much of the house in which I now live, as she may need during the time she remains my widow," with a residuary devise to his son, gives the widow a right to personally occupy during her life, in common with others, so much of the house and curtilage as she needs.

BILL for construction of will.

Mr. A. R. Shay, for complainant.

Mr. J. M. Robeson, for defendants.

THE CHANCELLOR. William S. Ingersoll, by his will, after providing for payment of his debts and funeral expenses, gave to his wife \$1,000, and directed his executor to put \$1,000 at interest, and pay her the interest for life; the principal, after her death, to go to any child or children she might have by the testator, and if, at her death, she should leave no such child or children, in that case he gave the principal to his son Frank. He then gave her the use of his household goods so long as she should remain his widow, and added:

"It is my wish that my wife, Margaret, shall have the privilege of occupying so much of the house in which I now live, as she may need, during the time she remains my widow."

He then gave pecuniary legacies to his daughters by his first wife, and to his grandson and granddaughter, and then gave all the rest and residue of his property, of whatever description, not thereinbefore disposed of, to his son Frank, whom he appointed sole executor.

The questions presented for decision are, What is the interest of the widow, under the will, in the house; whether it is such that she may lease or otherwise dispose of her right therein to a stranger; whether she has any right in the curtilage (the lot is a town lot in Newton), and whether the fee of the house and lot passes, under the residuary clause, to Frank.

The fee of the house and lot passes by the residuary devise to Frank, subject to the right of his stepmother, the widow, to occupy so much of the house (according to the language of the will) as she may need, during her widowhood. Her right is a personal one. Under the gift of the free use and occupation of a house, the donee is not confined to a personal use, so that he is debarred from letting the property during the continuance of his interest. (*King v. Eatington*, 4 T. R. 177; *Rabbeth v. Squire*, 4 De G. & J. 406.) But it is a question of intention, and if it appears, from the terms of the gift or the context of

the will, that a personal use only was intended, the enjoyment of the gift will be confined accordingly. As in *Maclaren v. Stainton*, 4 Jur. (N. S.) 199, where there was a gift over if the donee ceased to occupy the house, and in *Stone v. Parker*, 29 L. J. (Ch.) 874, where there was a direction to sell if the donee refused to occupy. The gift in the case, under consideration, is not of the right to occupy any definitely designated part of the house, but such part of it as the widow's personal convenience may require. This reference to her personal requirements is evidence that the testator contemplated a merely personal use, and so, indeed, are the terms of the gift generally. The inclination of courts, in construing gifts of this character, is towards holding them to be estates, and that has quite uniformly been done where the gift was of the whole property or of a specified part, but, as before stated, it is a question of intention, and there are cases in which, under language such as that by which the gift in this case is expressed, they have held the gift to be a mere personal privilege. In *Kingman v. Kingman*, 121 Mass. 249, a testator by his will devised as follows :

"I give to my wife, Fanny Kingman, the use and improvement of all my part of the dwelling-house where we now reside, except the right and privilege therein which is hereinafter devised to my daughter Tempy. I give to my daughter Tempy the use and improvement of so much of my house as she may need during her life."

It was held that the daughter had a personal interest in the nature of an easement or servitude. And so, too, in *Maech v. Nason*, 21 Vt. 115, where a testator gave his daughter the right "to live and remain in his house so long as she remained unmarried."

The gift of a house includes the curtilage also. And here the gift of the use and occupation of part of the house must reasonably be held to include the use of the curtilage in common with the occupant or occupants of the rest of the house.

Devise of use of property.—Requiring personal use.—A devise of the use and occupation of land usually conveys an estate in the land, and, unless a contrary intention appears, the right to let or assign it is in-

cluded. *Maclaren v. Stainton*, 27 L. J. Ch. 442; *Stone v. Parker*, 39 Id. 874; *Fillingham v. Bromley*, T. & R. 580.

A condition that a devisee shall reside on the property devised has been held void. *Pardue v. Givens*, 1 Jones' Eq. 306; *Newkerk v. Newkerk*, 2 Caines, 345.

But has been upheld in Georgia. *Low v. Garner*, 45 Ga. 481.

And in Maine a condition that one should live on and take care of a place until his mother died, the mother having the estate for life, remainder to the son, was sustained. *Marston v. Marston*, 47 Me. 495.

As to what may constitute personal residence sufficient to sustain the devise in England, where such a condition is valid, see *Woods v. Townley*, 11 Hare, 314; *Walcot v. Botfield*, Kay, 534; *Wynne v. Fletcher*, 24 Beav. 480; *Dunne v. Dunne*, 7 D. M. & G. 207; *Astley v. Earl of Essex*, L. R. 18 Eq. 295; *Doe v. Hawke*, 2 East, 481; *Doe v. Steward*, 1 Ad. & Ell. 300; *Wilkinson v. Wilkinson*, L. R. 12 Eq. 604; *Mitchel v. Reynolds*, 1 P. W. 181.

BIGGS vs. MCCARTY.

[86 Indiana, 352.]

DEVISE TO "A. AND HER CHILDREN."—EVIDENCE.—PRESUMPTION.

A devise to testator's daughter "A. and her children" conveys an estate in joint tenancy, under the statute, to the daughter and her children living at testator's death.

Testator intending to travel made a will with such a devise in December, 1849, and started on his trip in January, 1850, at which time his daughter's only child was dead. She had another child on November 20, 1851. The will was proved November 10, 1851, without exact evidence of the date of testator's death; held, it is to be presumed that the last infant was *en ventre sa mère* at the time of testator's death.

FROM the Shelby Circuit Court.

A. Major and *S. Major*, for appellants.

B. F. Love and *H. C. Morrison*, for appellee.

MORRIS, C. The appellants, Sanford A. Biggs, Ernest F. Biggs, John V. Biggs, Nannie L. Biggs and Enoch H. Pitts,

who were the plaintiffs below, allege in their complaint that Henry Stuck, of Boone county, Kentucky, contemplating a trip to California, on the 10th day of December, 1849, made his last will and testament, devising to two of his daughters and his wife his real estate in Kentucky, in fee simple, and devising his real estate in Shelby county, Indiana, to his daughter Angeline Biggs and her children; a part of which is in controversy in this suit. The testator left Boone county, Kentucky, for California, in January, 1850, and has not since been heard from; that, at the time the will was made, Mrs. Biggs had a child living, born November 10th, 1849; she had another child born November 20th, 1851, which died November 23d, 1851. The will, upon information of the testator's death, was probated in Boone county, Kentucky, on the 15th of November, 1851; that afterwards, on the 23d day of April, 1881, the plaintiffs applied to the Shelby Circuit Court, by petition in writing, and filed therewith a duly certified copy of said will and the probate thereof, asking said court to receive the same and to order the clerk of said court to file and record the same in the record of wills, as required by law; that said will and the probate thereof were received by said court, and the clerk of said court was duly ordered to file and record the same as aforesaid, which was done; that, at the time of the making of said will, the said Angeline Biggs was the wife of Perry D. Biggs, then of Boone county, Kentucky; that she had by him the following named children, to wit, Ernest L. Biggs, born November 10th, 1849, who died December 4th, 1850; Cora Adelaide Biggs, born November 20th, 1851, died November 23d, 1851; a son, born in November, 1852, who died the same day; Harriet A. Biggs, born May 14th, 1856; Charles H. Biggs, born November 9th, 1858, who died July 31st, 1873; Ernest F. Biggs, born August, 13th, 1861; John V. Biggs, born September 12th, 1863, and Nannie L. Biggs, born March 10th, 1868; that the said Harriet A. Biggs intermarried with Enoch H. Pitts, September 30th, 1869, and died intestate in 1880, leaving no child or descendant of a child her surviving, but leaving her husband, Enoch H. Pitts, and the plaintiffs, surviving her; that the said Angeline Biggs, the

mother of the plaintiffs, died intestate in July, 1877, at the county of Randolph, in the State of Missouri, leaving the plaintiffs and the said Harriet A. Pitts, her only children, her surviving.

It is then alleged that on the 21st day of December, 1858, the said Angeline Biggs and Perry D. Biggs, her husband, sold and conveyed to Shelley Stafford the land in controversy, which is part of the land devised by said testator to the said Angeline Biggs; that the same had been by the grantees of said Stafford conveyed to the defendant, who claims to be the owner of the same. It is also alleged that the said Angeline Biggs, under said will, took but a life-estate in the lands devised to her and to her children, or that she and her said children held said lands as tenants in common in fee simple; that said will of said Stuck has not been probated in any court in said county of Shelby, nor was there any certified copy of said will, and the probate thereof, recorded in the record of wills in said county of Shelby, until the same was recorded under the order of said Shelby Circuit Court, as above stated; that the appellee has been in possession of said land since 1870, receiving the rents and profits of the same, which are of the value of \$3,000. The plaintiffs pray that the court will settle and determine the rights of the plaintiffs and defendant in and to said lands, taking an account of the profits thereof, and order partition, etc. A copy of the will was filed with, and is made a part of, said complaint, as is also the petition of the appellants, filed in the Shelby Circuit Court, and the proceedings of said court thereon.

The appellee demurred to the complaint for the want of sufficient facts. The court sustained the demurrer, and the appellants electing to stand by their complaint, final judgment was rendered for the appellee. The sustaining of the demurrer to the complaint is the only error assigned. The appellee insists that, upon the facts stated in the complaint, he is, as against Enoch H. Pitts and Sanford Biggs, entitled, as an innocent purchaser, to the protection of section 17 of the act of May 31st, 1852, in relation to wills. (2 R. S. 1876, p. 574.) The section provides that "The title of any lands or interest

therein, purchased in good faith and for a valuable consideration from the heirs at law of any person who shall have died seized of real estate, shall not be impaired by virtue of any devise made by such person of the real estate so purchased, unless the will or codicil containing such devise shall have been fully proved, and recorded in the office of the clerk of the court having jurisdiction, within three years after the death of the testator, except :

“*First.* Where the devisee shall have been within the age of twenty-one years, of unsound mind, imprisoned, or out of the State at the death of such testator ; or,

“*Second.* Where it shall appear that the existence of such will or codicil shall have been concealed from, or unknown to, such devisee.

“In which cases, the limitation specified in this section shall not commence until after the expiration of one year from the time such disability shall have been removed or such will or codicil shall have come into the control of such devisee or his representative, or have been deposited in the clerk's office of the proper court of common pleas.”

It appears in the complaint that Angeline Biggs and her husband were married in Kentucky, and that she died in Missouri. It is not alleged, nor does it appear from the complaint, that she ever resided in the State of Indiana ; nor does it appear from the complaint that any of the appellants resided in this State at any time. For anything that appears in the complaint, the appellants may have resided out of the State until the commencement of this suit, and their mother may have lived out of the State until her death, which is alleged to have occurred in 1877. If they thus lived out of the State, the statute did not run against them.

Assuming that the statute referred to applies as well to foreign as to domestic wills, a question which we do not decide, the objection to the complaint is not well taken. Unless the complaint show upon its face that the appellants are not within any of the exceptions contained in the 17th section, the appellee must, in order to avail himself of its benefits, plead the limitation. (*Milner v. Hyland*, 77 Ind. 458 ; *Harlen v. Watson*, 63

Ind. 143.) In such case the question cannot be raised by demurrer. Nor is there anything in the case of *Pitts v. Melsner*, 72 Ind. 469, affecting this question, nor any of the questions presented by the appellants to this case.

The appellants insist—

First. That Angeline Biggs took a life-estate in the land devised to her and her children, and that, upon her death, her children then alive, took by way of executory devise, the remainder in fee as tenants in common, whether born before or after the testator's death, and whether he died after the death of the first child, who died Dec. 4th, 1850, and before the quickening of the second, born Nov. 20th, 1851, or died during the existence of the first or second child; or,

Second. If the testator died while the child that was alive when the will was made existed, or if he died while the child born Nov. 20th, 1851, was *in ventre sa mere*, then Mrs. Biggs and her children alive at the testator's death took as tenants in common the land in fee, which opened up from time to time, to let in after-born children.

In support of the first proposition, the appellants cite the following cases and authorities: *Carr v. Estill*, 16 B. Mon. 309; *Goss v. Eberhart*, 29 Ga. 545; *Sisson v. Seabury*, 1 Sum. 235; 1 Hill's Real Prop. 630, note; 4 Kent's Com. 221, note to 225; *Webb v. Holmes*, 3 B. Mon. 404; *Hatfield v. Sohler*, 114 Mass. 48; *Hannan v. Osborn*, 4 Paige, 336; *Borden v. Kingsbury*, 2 Root, 39; *Righter v. Forrester*, 1 Bush, 278; *Coursey v. Davis*, 46 Pa. St. 25; *Mitchell v. Long*, 80 Pa. St. 516; *Jennings v. Parker*, 24 Ga. 621; 1 Hill's Real Prop. 512, 519, 630, note.

In the first case cited from 16 B. Monroe, the devise was to "Mary Baker Didlake and her children." Mary B. Didlake had no child, and was an unmarried infant at the time the testator made his will and at the time he died. She afterwards married a Mr. Carr, and had by him one child. She and her husband sold and conveyed the land in fee simple to Estill. Her child afterwards sued for the land and recovered it. The court, rejecting the resolution in the Wild case, held that Mary B. Didlake took a life-estate in the land devised, and that

her child took the remainder in fee. The court concluded that as there was no child *in esse* at the time the devise was made who could take jointly with the mother, according to the literal import of the devise, the intent of the testator was to give to the mother a life-estate. It was argued by the court that, as the testator must have regarded the children of his daughter as the objects of his bounty, and knowing at the time that his daughter then had no children, he must have intended to provide for such future children as she might have. Without questioning the correctness of the inference thus drawn by the court, it is obvious that no such inference could obtain in the case in hearing. For, in this case, Mrs. Biggs had a child living at the time the devise was made, who could have taken jointly with her had it survived the testator. Besides, the construction adopted by the court in the Didlake case was not in accordance with the law of Indiana, where the resolution in the Wild case is held to be a part of the common law in force here.

In the case of *Sisson v. Seabury*, 1 Sumner, 235, the devise was in these words :

"I give and bequeath to my loving grandson, Philip Sisson, all my homestead farm and housing thereon standing, lying part in said Tiverton and part in the township of Dartmouth, in the province of Massachusetts Bay, with all my other lands, and salt meadows, and sedge flats in said Dartmouth, to him, my said grandson Philip Sisson, and to his male children lawfully begotten of his body, and their heirs forever, to be equally divided amongst them and their heirs forever."

The testator died in 1777, leaving his said grandson, then eleven years old, unmarried and without children. After the death of the testator, Philip took possession of the lands, and on the 29th of March, 1814, conveyed the same to Seabury. Philip died in 1817, and after his death one of his children brought this action to recover the lands from Seabury, claiming title under the will of Thomas Sisson, on the ground that said Philip took but a life-estate therein. The question was whether the devise created an estate tail in Philip Sisson, or an estate for life only, with a contingent remainder in fee in

his male children. From the last clause of the devise, to wit: "And to his male children lawfully begotten of his body, and their heirs forever, to be equally divided amongst them and their heirs forever," Judge Story held that Philip took a life-estate with a contingent remainder in favor of his male children. It was argued that in this way alone could the lands be equally divided amongst the male children lawfully begotten of his body and their heirs forever. Judge Story says: "The first part of the clause is, 'I give and bequeath unto my loving grandson, Philip Sisson, etc., and to his male children lawfully begotten of his body,' etc. If the will had stopped here, there could not have been a doubt, either upon principle or authority, that it was the intention of the testator to create an estate in tail male in the devisee. In the first place, the words import a devise *in presenti*, and as the devisee had no children at the time of the will, if we construe the words, 'his heirs male,' etc., as words of purchase and a *designatio personarum in presenti*, the devise becomes utterly void, from the want of proper objects *in esse* to take; so that the intention of the testator is defeated. * * * This is exactly in conformity to one of the resolutions in *Wild's Case*, (6 Co. R. 17). Now, *Wild's Case* has constantly been admitted to be good law; and relied on in many subsequent cases."

It was held in *Wild's Case* that a devise to one and his children should carry an estate in joint tenancy, when the person named had children living at the date of the will; but that when no such children existed, the term "children" should be construed as a word of limitation, and as equivalent to issue of his body, thus creating an estate-tail general as to real estate. It would seem, therefore, that according to the reasoning of Judge Story in the case of *Sisson v. Seabury*, cited and relied upon by the appellants, and the resolution in the *Wild's Case*, the case of *Carr v. Estill*, *supra*, was not well decided. We think neither of the cases supports the first proposition insisted upon by the appellants.

In the case of *Webb v. Holmes*, *supra*, a conveyance, made by Henry Crist and Rachel, his wife, to their daughter, Sarah Thomas, read thus: "This indenture, made and entered into

this 25th day of July, 1812, between Henry Crist and Rachel his wife, of Bullitt county and Commonwealth of Kentucky, of the one part, and Francis and Sarah Thomas of the same place, of the other part, witnesseth, that for the love and goodwill for them and their children, that intending to convey to Sarah Thomas a certain *dower* in lands, for the entire benefit of her and his children, do hereby, and by these presents, transfer, set over, and convey to her and her children forever, all that certain tract," etc., "containing," etc., "which said tract of land, with all and singular its appurtenances thereunto belonging, we do hereby transfer and convey to said Sarah Thomas and her children forever," etc.

Sarah Thomas had four children alive at the date of the deed, and four were born after the making of the deed and before the death of her husband. The court held that Sarah took a life-estate in the land conveyed, and that all her children took the remainder in fee. The court seem to lay some stress on the word "dower" as used in the conveyance. Unless the decision turned upon the use of the word "dower," the case is in direct conflict with that of *King v. Rea*, 56 Ind. 1, and cannot be regarded as authority in this State.

In the case of *Hatfield v. Sohler*, 114 Mass. 48, the testatrix, Mrs. Coleman, devised to her daughter, Mrs. Hatfield, to her sole and separate use, free from the interference of her husband or any other person, to have and to hold the same to her sole and separate use as aforesaid, and to her children or child, or the issue of any deceased child, in equal proportions. Mrs. Hatfield had two children at the date of the will, and afterwards by a second husband had two other children. Of this devise the court say: "It is not to Mrs. Hatfield, her heirs and assigns, and contains no words extending her interest beyond her life. There are no terms used indicating an intention to give her the power of disposal during her life. The devise 'to the children or child of the said Louisa or the issue of any deceased child in equal proportions,' is inconsistent with an intention to give Mrs. Hatfield a fee or an estate in tail. These are words of purchase, and are of no effect if she took an estate of inheritance with the power of disposal. We think

the intention of the testatrix was to give Mrs. Hatfield an estate for life, and the remainder to her children." The court held that the remainder opened to let in children born after the death of the testatrix.

This case differs from that before us in several respects. The devise gave the property to Hrs. Hatfield exclusively for the period for which she was entitled to hold it. Its terms did not create in her anything more than a life-estate. There was a clearly expressed purpose to give an estate to the child or children. They must take in remainder or not at all. The construction adopted was the only one by which the intention of the testator could be maintained. By section 5 of the act of 1843 (R. S. 1843, p. 485), which was in force at the time the will of Henry Stuck was made and at his death, it is provided that "Every devise of lands shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall manifestly appear by the will that the devisor intended to convey a less estate." Had the appellants been in existence at the time of the testator's death, it would hardly be pretended that they and their mother would not have taken the land in controversy in fee as tenants in common; and in this it differs from the case just cited.

The case of *Hannan v. Osborn*, 4 Paige, 336, is also cited and relied upon by the appellants. The devise in the will of Alexander Hannan was as follows: "I give, devise and bequeath unto my sister Mary Ann Philips, wife of Thomas Philips, of the city of New York, all the remainder of my estate, both real and personal: To have and to hold the same to her and her children, forever. But in case my said sister Mary Ann shall die, and all her children shall die, leaving no children, then my will is, that this part of my estate shall then be divided among my brother and sisters; to wit, brother John, and sisters Julianna Stone and Amelia Manchester."

It was expressly provided in New York at the time, by statute, that the intent of the party shall govern, as well in the construction of deeds as of wills. And, in view of this, the Chancellor in this case says: "The rule, that the intention of the testator, so far as it can legally be carried into effect,

should govern in all devises of real estate, has always been acted upon by courts of justice ; except in two or three special cases, where technical rules of law have been permitted to defeat such intent. The revised statutes having abolished the rule in *Shelley's Case*, which formed one of those exceptions, and having also restored the expressions, 'die without issue,' and 'die without leaving issue,' to their natural and obvious meaning, courts of justice are now left free to give such construction to the language of a testator in his will, as to carry into effect his intention." The court further says : " By the common law, a devise to a man and his children as an immediate gift to both, was held to be a devise to the parent and children jointly, or to give an estate tail to the father, according to circumstances. If there were children in existence at the time, it was held that they took jointly with the parent ; but if there were none, he took an estate tail by implication."

The chancellor then further states that if, from the will, it appeared that the intention of the testator was, that the children should take the estate *only* by way of remainder after the death of the parent, then the children who were in existence at the death of the testator, as well as after-born children, took the estate as purchasers, after the termination of the life-estate of the parent. He also held that by the terms of the devise the intention of the testator was to give Mary Ann Philips a life-estate only, and that her children took the remainder, which vested in those alive at the death of the testator, opening to let in after-born children.

We think this case cannot be held to support the propositions relied upon by the appellants, but that, as contended by the appellee, it is opposed to them. This is a devise to Angeline Biggs and her children ; it does not appear from the language of the devise that the testator intended that Angeline should have only a life-estate, and that her children should take the estate by way of remainder in fee after her death. Therefore, in the language of Chancellor Walworth, if there was a child alive at the death of the testator, Angeline and such child, by the common law, took the estate jointly, or, under our statute, as tenants in common.

We have carefully examined the other cases referred to by the appellants' counsel in their able and elaborate brief, but to discuss and examine them here would extend this opinion unduly. In view of the decisions of our own court, we do not think that the first proposition relied upon by the appellants is the law. (*Siceloff v. Redman's Adm'r*, 26 Ind. 251; *McCray v. Lipp*, 35 Ind. 116; *Andrews v. Spurlin*, 35 Ind. 262; *Gonzales v. Barton*, 45 Ind. 295; *King v. Rea*, 56 Ind. 1.)

We admit that, as contended by the appellants, the intention of the testator, as gathered from the whole will, should, so far as it can consistently with the rules of law, be enforced, and that it should guide courts in the construction of the will; but, as will be seen by an examination of the cases referred to by the appellants, it is not always the presumed or actual intention of the testator, but, as contra-distinguished therefrom, his legal intention, that must be enforced. The application of the rule in *Shelley's Case* sometimes unquestionably defeats the intention and actual purposes of the testator; yet the rule has been so long adhered to in Indiana that it must be regarded as the law here until changed by the legislature.

The devise in this case is extremely simple. Its language is: "I give and bequeath to my daughter Angeline Biggs and her children all my real estate in the county of Shelby, and State of Indiana." Angeline had one child living at the time the will was made. She did not, therefore, according to *Wild's Case*, take an estate tail by implication.

It is alleged in the complaint that the testator's will was probated in Kentucky on the 15th day of November, 1851, upon information of the testator's death. It is also alleged that on the 20th day of November, 1851, five days after the will was probated, another child was born to Angeline, which died three days afterwards; the first child died December 4th, 1850, nearly a year before the second was born.

Upon these facts we think it fair to infer that the testator died after the quickening of the second child, and at a time when it was legally capable of taking the estate jointly, or as a tenant in common, with its mother Angeline; that consequently, upon the testator's death, by the plain terms of the

devise, the land in controversy vested in the devisee Angeline and the child with which she was then pregnant as tenants in common. (*Hannan v. Osborn, supra*; *Shotts v. Poe*, 47 Md. 513; *Viner v. Francis*, 2 Cox, 190; *Benson v. Wright*, 4 Md. Ch. Dec. 278.)

The appellants insist that, if this should be conceded, the estate so vested in Angeline and her child as that it opened to let in after-born children; that the testator knowing at the time that he made the will that Angeline had then but one child, he used the word "children" to indicate his purpose to provide for all the children which she might have; that the use of the word "children" is inconsistent with the intention on the part of the testator to limit his bounty to the mother and child then living, or to such children as might exist at the time of his death. But to this it may be replied that the word "children" is used in a general sense, applying as well to such child or to such children as might be living at his death, as to such and subsequently born children. We have not been able to find a case like this in which it has been held that the estate opened to let in after-born children.

It is said in 2 Jarman on Wills, 702, that "An immediate gift to children (*i.e.*, a gift to take effect in possession immediately on the testator's decease) * * comprehends the children living at the testator's death (if any), and those only. Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution." He further says: "In cases falling within this rule, the children, if any, living at the death of the testator, take an immediately vested interest in their shares, subject to the diminution of those shares * * as the number of objects is augmented by future births, during the life of the tenant for life."

It is obvious that the devise under consideration falls within the first, and not within the second, proposition laid down by Jarman. It falls within the first, because the gift takes effect immediately upon the death of the testator. It does not fall

within the second, because there is no particular estate carved out of the thing devised, nor is there any gift over to the children. In complete agreement with Jarman is the case of *Jones' Appeal from Probate*, 48 Conn. 60; *Hannan v. Osborn*, *supra*.

In the case of *Shotts v. Poe*, 47 Md. 513; 28 Am. R. 485, the testator, Lewis Shotts, by his will devised all his property to his son, John Lewis Shotts. Afterwards the testator executed a declaration of trust, setting forth that, in consideration of the natural love and affection which he bore for the children of his said son, he did thereby appoint the said John Lewis Shotts trustee "for the following property for their use, and until they arrived to the age of eighteen years: \$1,500 in Baltimore City Stock, and one note of Christian Weisample for \$5,000, to take effect at my death; and when each child arrives at age, the said property to go to my son, John Lewis Shotts."

The testator died in 1857, and the will and declaration of trust were admitted to probate as testamentary papers. John Lewis Shotts had, at the date of the trust and at the death of the testator, only two children. He renounced the executorship of the will, and Poe was appointed administrator with the will annexed, who filed a bill in equity, suggesting doubts as to the construction of the will.

After disposing of some preliminary questions, the court says: "The only other question is, whether the term 'children,' used in the declaration of trust, includes children of the son, John Lewis Shotts, that may be born after the death of the testator? And upon this question there can be no doubt whatever. If there may be any question that may be regarded as incontrovertibly settled, in the construction of wills or testamentary papers, it is, that an immediate gift to children, *simpliciter*, without additional description, means a gift to the children in existence at the death of the testator; provided there be children then in existence to take. In Powell on Devises, vol. 2, p. 302, the rule, as deduced from all the cases, is stated thus: 'That an immediate gift to children (*i. e.*, immediate in point of enjoyment), whether of a person living or

dead; and whether it be to the children simply, or to *all* the children; and whether there be a gift over or not, comprehends the *children living at the testator's death* (if any), and *those only*; notwithstanding some of the early cases, which make the time of the making the will the period of ascertaining the objects.' To the same effect is the rule as stated by Redfield on Wills, pt. 2, p. 330; * * and the decided cases fully support the propositions thus laid down by the text-writers." See the many cases cited by the court.

We have examined with care the cases referred to by the appellants. We are aware that the case of *Coursey v. Davis*, 46 Pa. St. 25, seems to support the position of the appellants, but in so far as it does this it is opposed to our own decisions. So, too, the case in 3 B. Mon. is apparently in their favor, but, as before shown, the case is opposed to the decisions of this court. So, too, the case of *Jackson v. Coggins*, 29 Ga. 403, seems to sustain the second proposition relied upon by the appellants; while the case of *Goss v. Eberhart*, 29 Ga. 545, supports the first. But we think the clear weight of authority is the other way.

The following cases, among others, referred to by the appellee's counsel, support the conclusions which we have reached: *Goodwin v. Goodwin*, 48 Ind. 584; *Glass v. Glass*, 71 Ind. 392; *Jenkins v. Freyer*, 4 Paige, 47; *Gross's Estate*, 10 Pa. St. 360; *Worcester v. Worcester*, 101 Mass. 128; *Campbell v. Rawdon*, 18 N. Y. 412; *Hanbury v. Doolittle*, 38 Ill. 202; *Swinton v. Legare*, 2 McCord's Ch. (S. C.) 404; *Nimmo v. Stewart*, 21 Ala. 682; *Lorillard v. Coster*, 5 Paige, 172; *King v. Rea*, 56 Ind. 1; 3 Washburn's Real Prop., 3d ed., side p. 685.

In *Handbury v. Doolittle*, *supra*, it was held that if no estate intervenes between the death of the testator and the vesting of the estate in children as a class, the estate goes to the children in being at the death of the testator.

In the case of *Nimmo v. Stewart*, *supra*, it was held that if a devise be to one and his children, and he has children at the date of the will and at the death of the testator, the parent and children living at the death of the testator take jointly under

the will. To the same effect is the case of *Smith v. Ashurst*, 34 Ala. 208.

This case has been argued elaborately and with much ability on both sides. We have endeavored to consider the case with the care which its importance seemed to require, and have concluded :

First. That the devise cannot be construed as giving to Angeline Biggs a life-estate in the land described in the complaint, and the remainder in fee to her children.

Second. That, upon the facts stated in the complaint, the fair inference is that the testator, Henry Stuck, died while the second child of Angeline Biggs was *in ventre sa mere*, and that, upon the testator's death, Angeline and said second child took, under said will, as tenants in common, the land in dispute, but that the estate thus vested in them did not open to let in after-born children.

Third. That, upon the death of said second child, its interest passed to its parents, and that their subsequent grantees took the whole title to said land ; that there is no error in the record, and that the judgment below should be affirmed.

POTTER vs. BALDWIN.

[188 Massachusetts, 427.]

UNDUE INFLUENCE.—TESTATOR'S DECLARATIONS.

Upon an issue of undue influence by a beneficiary not related to testator, statements made by the testator to his son eight years before the date of his will, that he could not resist the influence of such beneficiary, are properly received in connection with similar expressions of feeling up to the date of the will. So statements by deceased, the night before his death, that he wanted to see his son, and that "he did not know but he had been deceived," are admissible.

APPEAL by the only son and heir at law of John Baldwin, deceased, from a decree of the Probate Court allowing such decedent's will.

The only issue submitted to the jury was whether the will was obtained by the undue influence of Mrs. Francelia S. Lane. The will was dated January 30th, 1880, and bequeathed testator's entire estate to Mrs. Lane. Testator died February 17, 1880.

The judge admitted, against appellee's objections, for the purpose of showing testator's feelings towards Lane and his son, evidence of conversations in 1872, between testator and his son in which testator said he was so under Lane's influence that he could not resist her when in her presence, which was followed by evidence of similar expressions from time to time up to the date of the will; and evidence of a conversation between testator and one O'Neil, the night before his death, in which he said he wished to see his son, and did not know but he had been deceived.

These conversations were used by the counsel for the appellant, in his argument to the jury, as showing undue influence and deception by Lane.

D. W. Bond, for the appellee.

G. Wells (N. A. Leonard with him), for the appellant.

DEVENS, J. The evidence of conversations between the testator and his son and son's wife in 1872, wherein he said that he was so under the influence of Francelia S. Lane that he could not resist her when he was in her presence, in connection with similar expressions of feeling up to the date of the will, was properly admitted for the purpose of showing the state of the testator's feeling towards her. (*Shailer v. Bumstead*, 99 Mass. 112; *Lewis v. Mason*, 109 Mass. 160.) They strongly resemble those received in *May v. Bradlee*, 127 Mass. 414, where the question was whether a testator was induced by undue influence to revoke a will, to the effect that a certain person (through whose influence it was contended that the will was revoked) told him to erase his name, and that he felt that he had to do as this person said.

Upon similar grounds, the evidence of a conversation the night before he died, in which he stated that he wished "to see

his son Joseph, and that he did not know but that he had been deceived," was admissible to show his state of feeling towards his son and Francelia S. Lane. The wish to see his son might well be considered as showing a kindly feeling toward him. (*Lewis v. Mason, ubi supra.*) While the declaration did not state by whom he felt that he might have been deceived, yet, when taken in connection with the evidence appearing in the case in regard to Mrs. Lane, it might have been found by the jury to refer to her and to exhibit his then state of feeling towards her.

In proving the existence of that undue influence over a testator, by which his will may be avoided, two things are necessarily to be shown, the extraneous words, acts or circumstances by which it has been exerted, and the effect thereby produced upon the mind of the testator, the former of which cannot, the latter of which may, be shown by his declarations. The difference is certainly obvious between receiving the declarations of a testator to prove an external fact, such as duress, fraud or importunate solicitation, and as evidence merely of his mental condition. In the one case, it is hearsay evidence, and open to all the objections applicable to that species of evidence, while in the other it is appropriate, and directly bears upon the issue to be tried. (*Waterman v. Whitney*, 1 Kernan, 157, 165.)

For the purpose for which it was admitted, the evidence was therefore competent. It is not to be inferred that it was applied by the jury to any other purpose. If these conversations were used at the trial by the counsel for the appellant in his argument for the purpose of showing undue influence and deception by Francelia S. Lane, such use was certainly improper. But the counsel for the appellee asked no instructions as to the use and effect of this evidence, nor did he, so far as the bill of exceptions shows, call the attention of the presiding judge to the matter. He cannot now object that it was not limited by the presiding judge in his instructions to the only purpose for which it was competent. If evidence be admissible for any purpose, its admission cannot be made a ground of exception, unless it be shown that the judge refused to limit it to that purpose, and permitted it to be used for a purpose for

which it was not competent, against the objection of the accepting party. (*Hove v. Ray*, 114 Mass. 88; *Packer v. Lockman*, 115 Mass. 72.) As the evidence had been admitted for a purpose we deem to have been competent, and as no instruction was requested or given limiting its effect to that purpose, we cannot infer otherwise than that both the counsel for the appellee and presiding judge deemed that the purpose of its admission had been stated with sufficient clearness at the time it was received, and that, notwithstanding the argument of the counsel for the appellant, there was no danger that the jury would be misled in its application. Had the counsel for the appellee thought differently, he certainly should have called the attention of the presiding judge to the matter. Not having done so, he has now no just ground of complaint.

Exceptions overruled.

See Canada's Appeal, 1 Am. Prob. R. 1; *Mooney v. Olsen*, Id. 65; *Milton v. Hunter*, Id. 521; *Dye v. Young*, 2 Id. 315.

MILLER vs. MILLER.

[91 New York, 315.]

INHERITANCE BY ILLEGITIMATE CHILD LEGITIMATED BY PARENTS' MARRIAGE.

Where an illegitimate child has been legitimated by the subsequent marriage of its parents according to the laws of the State where the marriage takes place, and the parents are domiciled, such legitimacy follows the child everywhere and entitles him to the right to inherit.

APPEAL from a judgment of the general term of the supreme court in the third judicial department, affirming a judgment in defendant's favor entered upon the report of a referee.

Action of ejectment.

Robert Stephens, for appellant.

John A. Reynolds, for respondents.

MILLER, J. By the statute of this State the real estate of an intestate passes in the first instance to his lineal descendants. (1 R. S. 751, §§ 1 and 2.) It is also provided that "children and relatives who are illegitimate shall not be entitled to inherit." (1 R. S. 754, § 19.) The plaintiff is a child of the deceased under whom he claims and one of his lineal descendants. He was born in the kingdom of Wurtemberg in the year 1845, before the marriage of his parents, and the question to be determined is whether he was legitimate at the time of the death of his father. At the time of his birth his father and mother were domiciled and resided at Wurtemberg. A statute found in the Laws of 1610 of that kingdom, at title 17, § 4, is as follows: "Whatever is decreed in the foregoing title regarding the inheritance of children born in lawful wedlock shall be applicable also to such children as are begotten of two persons unmarried (but not too closely related for their betrothal or lawful conjugal cohabitation) and who first became legitimate by a subsequent marriage of their parents, shall be held equal to those children who are born in lawful wedlock as regards the right of inheritance from its parents, brothers and sisters and other relatives as in all other respects." Any subsequent marriage of the parents of the plaintiff would, therefore, render him legitimate at the place of his birth and the domicile of himself and parents—Wurtemberg, and if the father had resided at Wurtemberg at the time of his decease, plaintiff would have been one of his lawful descendants, the same as though he had been born in wedlock.

The plaintiff with his parents subsequently removed to the State of Pennsylvania, and his father became a citizen of the United States by naturalization, and while domiciled there and in the year 1853 his parents were lawfully married. In 1862 the family removed to this State, where they lived until the death of the father in 1875. The real estate in question was purchased by plaintiff's father after his removal to this State, and he owned the same in fee at the time of his death.

We think that by the law of the domicile of the plaintiff's birth, Wurtemberg, and by the subsequent marriage of his parents, the plaintiff was legitimated in the State of Pennsyl-

vania. Be that as it may, however, in the year 1857 a law was passed by the legislature of the State of Pennsylvania which declared that: "In any and every case where the father and mother of an illegitimate child or children shall enter into the bonds of holy wedlock and cohabit, such child or children shall thereby become legitimated and enjoy all the rights and privileges as if they had been born during the wedlock of their parents." (See Brightley's Purdon's Digest [ed. 1873], 1004, § 9.) The above act was followed by an act passed in 1858, by which the provision cited was made applicable to all cases arising prior to 1857, unless some interest had become vested. As the real estate which is the subject of this controversy had not been acquired prior to the acts referred to, no vested interest existed which conflicted with the acts cited. It is very evident that the plaintiff after the passage of the above laws was a legitimate child and entitled to all the rights and privileges of a lineal descendant of his parents. If his father had died in the State of Pennsylvania seized of real estate it cannot be questioned that any doubt would arise in regard to his claim thereto. He was invested with all the rights of a citizen entitled to inherit such portion of his father's estate as the law allowed to legitimate children. Occupying this position can it be said that the plaintiff lost such right because his father moved out of the State of Pennsylvania and located in the State of New York? Could he be legitimate in one State and illegitimate in another? Such a rule would render the right of inheritance, sanctioned by the law of the State where he resided, one of great uncertainty and fluctuation, and in many cases it would operate so as to produce great injustice. While the power of the legislature is paramount unless restricted by constitutional authority, it should not be upheld where its effect may be to produce great wrongs, unless imperatively demanded. Any other rule would leave the plaintiff, whose status was fixed by the laws of Pennsylvania, subject to the change of statutes in any State where he might have occasion to reside, whose laws differed from the former State. Assuming that the plaintiff by the laws of the State of Pennsylvania was legitimate, the question arises whether that

legitimacy was carried with him when his father and family removed to the State of New York. If the plaintiff labored under any disability in the State of New York it arose by reason of the provisions of law contained in the statutes of that State already cited. (1 R. S. 754, § 19.)

The law-making power can declare a child born to be legitimate or illegitimate, and it is only that power which fixes and determines the status of children born. If born before marriage the legislature can remove the disability of its illegitimacy, and by its transcendent power can legitimize, and make capable of inheriting, the illegitimate child. (Blackstone, 4 Inst. 36.) If this had been done by an act of the legislature of the State of New York, no question could arise as to the legitimacy of the plaintiff or his right to inherit. The statutes of this State, to which we have referred, do not contain the words "born out of wedlock," or the word "bastard." The English statute of Merton, so-called (20 Hen. III, ch. 9), not only required that a child, in order to inherit, should be legitimate, but also that he should be born in lawful wedlock as well. This constitutes a marked difference between that statute and the statute of this State, cited *supra*. Legitimacy, which was conferred upon the plaintiff by the laws of Pennsylvania, to which reference has been had, constituted a portion of his rights, and accompanied him wherever he might reside. Being legitimate in the State of Pennsylvania, he continued so in every State and in every country where he chose to establish his residence. The rule seems to be well settled that the law of the domicile of origin governs the state and condition of a person in whatever country he may remove to. The status of legitimacy which arises under the law of one nation is recognized by other nations according to the authorities. Story lays down the rule in his Conflict of Laws (§ 93), that "foreign jurists generally maintain that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicile of origin." He also says, at section 93b: "It seems admitted by foreign jurists, that as the validity of the marriage must depend upon the law of the country where it is celebrated, the status or condition of their offspring, as to legitimacy or illegitimacy, ought to depend

on the same law, so that if by the law of the place of the marriage the offspring, although born before marriage, would be legitimate, they ought to be deemed legitimate in every other country for all purposes whatever, including heirship of immovable property." Wheaton, in his Law of Nations, at page 172, says: "Legitimacy or illegitimacy are among universal personal qualifications, and the laws of the State affecting all these personal qualities of its subjects travel with them wherever they go and attach to them in whatever country they may be resident." The general current of authority favors the doctrine that where an illegitimate child has been legitimated by the subsequent marriage of its parents according to the laws of the State or country where the marriage takes place and the parents are domiciled, such legitimacy follows the child wherever it may go. This rule is, as we have seen, fully sustained by the authorities to which we have referred. The learned Judge Story, in his "Conflict of Laws," devotes nearly the entire fourth chapter, and no inconsiderable portion of the work, to the consideration of the question involved in the case at bar, and he asserts the rule, that if a person is legitimated in a country where domiciled, he is legitimate everywhere and entitled to all the rights flowing from that status, including the right to inherit. He arrives at this conclusion after an examination and exhaustive discussion of the subject and after a comparison of the views of different writers upon civil law, quoting extensively from the same.

In support of the same general doctrine which has been discussed, are the following authorities: *Smith v. Kelly's Heirs*, 23 Miss. 170; *Scott v. Key*, 11 La. Ann. 232; *Ross v. Ross*, 129 Mass. 243; *In re Goodman's Trust*, Law Reports, 17 Chancery Div. 266; *Van Voorhis v. Brintnall*, 86 N. Y. 18; 40 Am. Rep. 505.

The decision of this court might well rest upon the principle asserted in the authorities already cited without regard to the cases which are claimed to hold a contrary rule. It is enough to say that the right of inheritance under circumstances like these here presented rests upon a principle which is founded upon a rule of ancient origin, reasonable in itself and

in accordance with the well being of society and a due regard to the right of persons, and that it is fully sustained by the weight of authority. The celebrated case of *Birtchistle v. Vardill*, reported in 11 Eng. C. L. 266, also in 2 Clark & Fin. 581, and 7 Id. 895, and 9 Bligh, 7, involved a question of similar character to that presented in the case at bar, and is specially relied upon by the respondent's counsel. It was there held that a child born in Scotland, of unmarried parents domiciled in that country, and who afterwards intermarried there, is not by such marriage rendered capable of inheriting lands in England. By the Scottish law the marriage legitimated the child. It was laid down by the chief baron on behalf of the court that the comity existing between nations is conclusive to give the claimant the character of the eldest legitimate son of his father and to give him all the rights which are necessarily consequent upon that character. Thus sustaining the general doctrine that by the comity between different nations the laws of one should be recognized by the other in reference to rendering children of parents born out of wedlock legitimate, but it further held that the son could not inherit in England, for the reason that although he was legitimate he was not born in wedlock. The distinction between being legitimate and being born in wedlock would seem to be a narrow one, and it is difficult to see how it can be urged that a person can be made legitimate although born a bastard, and yet for the purpose of inheriting real estate be illegitimate because not born in wedlock. The particular phraseology of the statute of Merton, so called, had much to do with this limited and narrow construction, and it is but fair to assume that if the term "born in wedlock" had been excluded the right of inheritance would have been maintained. It was said in that case by Bayley, J., that "the right to inherit lands depends upon the quality of the land and not upon any personal statutes." It would thus seem that the case was decided upon the peculiar laws governing real estate in England and especially upon the statute of Merton. It was twice argued in the House of Lords (2 Clark & Fin. 581; 7 Id. 895) and eventually decided upon the sole ground that although a child born in Scotland before the marriage of his parents

would become legitimate by the subsequent marriage of said parents, yet he could not inherit in England, for the reason that the English statute does not only require that the child be legitimate, but that he must also be born in wedlock. This distinction was strongly criticised by Lord Brougham, one of the ablest of English jurists, and one of the judges in that case when last heard. He says: "If what is laid down in this case be law the bounds of that law are very narrow; if it is the law anywhere it prevails assuredly *only* as the law within the bounds of Westminster Hall. I know, wherever I go in Europe, it is boldly denied to be the law. I know the opinion of Dr. Story and another American jurist is against us, and I do not think I could overstate the degree in which all these jurists dissent from the judgment in this case." (See 7 Clark & Fin. 915.) Wharton in his Conflict of Laws (§ 241), says, in regard to this case: "The opinion was based on the special ground that the English law as to the descent of honors and real property was of a positive and distinctive character, and could not be invaded by the prescription of a foreign jurisprudence." Parsons, in his work on Contracts, in commenting on this case, says: "We think such a marriage in Scotland, supposing parents and child afterward come to America and be naturalized here, would be held here to make the child an heir as well as give him all other rights of legitimacy."

The case of *Smith v. Derr's Adm'rs* (34 Penn. St. 126) arose under a statute of Pennsylvania similar to the statute of Merton, and was disposed of in a very brief opinion upon the authority of the case of *Birtwhistle v. Vardill* (*supra*).

The case of *Lingen v. Lingen* (45 Ala. 410) is contrary to the general current of authority, and should not, we think, be followed.

When the State of Pennsylvania, by its legislature, declared that: "In any and every case when the father and mother of an illegitimate child or children shall enter into the bonds of holy wedlock and cohabit, such child or children shall thereby become legitimate and enjoy all the rights and privileges as if they had been born during the wedlock of their parents," it did not mean that the persons who were born ille-

gitimate would only be legitimate if born in lawful wedlock. Its intention was to legitimize the offspring of those who were unmarried at the time of the birth of their child, and any other construction would lead to the making of provision for children lawfully born instead of those who were illegitimate. To hold a different rule would nullify the law and be contrary to the interpretation usually given to remedial statutes of the character of the one considered.

We do not deem it necessary to consider the question as to the definition of the word "legitimate;" whether it embraces "born out of wedlock" is in our opinion not material, as under the authorities we have cited, a child thus born may be made legitimate by law, and its legitimacy recognized in other countries besides the domicile of its parents, by the comity of nations. We think we have fully established this proposition, and although there are some authorities which hold differently, they are not sufficient to overturn the doctrine laid down in the elementary books and reported cases.

The case of *Birtwhistle v. Vardill* is so limited and restricted that it must be held only to apply to the law as established in Great Britain. We have examined the other authorities not specially referred to, which have been cited by the respondents' counsel, and we think none of them are in conflict with the rule we have laid down.

In our opinion the judgment of the general term was erroneous, and should be reversed, and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

RIZER vs. PERRY.

[58 Maryland, 112.]

VOID DEVISES PASS TO HEIR AT LAW.

Void devises pass to the heir at law in the absence of evidence that the residuary devisee was intended to receive them.

A statute that every will "shall pass all the real estate which the testator had at the time of his death," does not alter the rule.

APPEAL from the Circuit Court for Alleghany county.

Action by the heirs at law of Mary Hoyer, for a construction of her will.

"By the will of the deceased, admitted to probate in October, 1875, but bearing date the 6th of August, 1873, among other bequests and devises, she desired and directed that her lot, in the city of Cumberland, should be divided, and that the one part thereof should be sold by her executors, and the proceeds divided specifically among certain parties named, and the other part of the lot, with the dwelling thereon, she devised to her niece, Mary Perry, for life, and the reversion therein, she attempted to dispose of, as follows:

"'Item. After the death of my niece, Mary Perry, I hereby authorize and direct my executors to dispose of the dwelling-house, and the balance of the lot on which it stands, and the funds or proceeds of said sale to be divided into two equal parts, which I devise and bequeath to the trustees of the Mary Hoyer School House, in Cumberland, Maryland, for *educational purposes*, and to the African Missionary Society, for the purpose of *converting* and *Christianizing* the African race, share and share alike;' and after certain pecuniary bequests, the residuary clause of the will, is as follows:

"'Item. The *remainder* of my estate, both real and personal, wherever situated, I give and bequeath to the before mentioned Isabella Rizer, Lucy Perry, Lucy Annan and Mary C. Perry, to be equally divided between them, share and share alike.'

"Mary Perry, the life-tenant, died some three or four years

ago; and since the filing of the bill in this case, the executors of the testatrix have sold the real estate in controversy. They are parties defendants, and they offer to bring the proceeds of sale into court.

"To the bill in this case, certain parties claiming to be the trustees of the Mary Hoyer School House, in Cumberland, have appeared and make claim; but as to the African Missionary Society, it has no representation, and it is conceded, that such society has no corporate existence whatever.

"The residuary devisees and legatees under the will also make claim to the proceeds of sale; and in this conflict of claim, the question is, to whom, upon the proper construction of the will, should the proceeds of the sale be awarded?"

James E. Ellegood, J. W. Thomas and William Brace, for appellants.

J. H. Gordon, for appellees.

IRVING, J. There are two appeals in this case taken by different parties in antagonistic interests, and both claiming against the heirs at law of Mrs. Mary Hoyer, in whose favor the decree of the court below was passed. The case, therefore, presents a tripartite contest. The trustees of "The Mary Hoyer School House" insist that the court below was in error in declaring a certain legacy to them, void. The other appellants, who are the residuary legatees and devisees under Mrs. Hoyer's will, contend there was no error in declaring that legacy void, but that there was error in disregarding their claim, as the residuary legatees and devisees, to the proceeds of the void legacy or devise (whichever it may be regarded), and in giving the same to the heirs at law of Mrs. Hoyer. The clauses of the will involved in this case, and the facts which raise the controversy, are sufficiently set out in the opinion of the judge who decided the case below. The questions involved are so fully and clearly discussed in that opinion, and concurring as we do in the conclusions reached, we should add nothing to its reasoning, but for the earnest reliance of the counsel for the

residuary legatees and devisees, in this court, upon the 309th sec. of Art. 93 of the Code, as abolishing *all distinctions* between real and personal property as respects the operation of the residuary clause of a will. The argument in favor of that position was very ably presented; and at the hearing we were strongly impressed by the authorities cited from other States where statutes like our own prevail, and doubted whether our own decisions, pronounced since the passage of the act of 1849, which gives the section referred to in the Code, and without the point having been made, ought to be followed. After a careful examination of all the authorities cited, and others that were not cited, we find the decisions in the other States upon that question are by no means uniform; but on the contrary are very conflicting. The preponderance, if any, being we think in favor of upholding the distinction, so far as lapsed and void legacies are concerned, where the statute has not in express terms provided for them. In some of the States void and lapsed devises are held to stand on different foundations, and are to be controlled by a different rule. Following *Doe, Lessee of Stewart v. Sheffield*, 13 East, 526, and *Morris v. Underdown*, Willes, 293, it has been held that devises, void from the beginning, pass with the residue under the residuary clause; whilst lapsed devises having been good when made, but becoming inoperative for after-arising causes, should not so pass, unless expressly so directed by statute. (*Patterson v. Swallow*, 44 Penn. 436; *Ferguson's Lessee v. Hodges*, 1 Harrington, 524.) Our decision of *Lingan v. Carroll*, 3 H. & McH. (353), 333, is referred to in those cases, and cited as counter authority which could not be followed. The doctrine of *Lingan v. Carroll* was again re-asserted in *Tongue v. Nutwell*, 13 Md. 415, in *Deford v. Deford*, 36 Md. 168, and in *Orrick and Wife v. Boehm*, 49 Md. 105; and that must still be the law of this State, unless the 309th sec. of Art. 93, which does not appear to have been brought to the attention of the court in those cases, compels a departure from the ruling in those cases.

The language of our statute is very broad and general, and if it would not disturb the authority of decisions already rendered, in the face of the statute which it was the duty of the

court to know, and of which the court did know and had passed upon in other aspects (though it was not, as appears, especially brought to their attention in those cases), we should incline to follow the rulings in Massachusetts and New Jersey, where they have statutes similar to our own; New Jersey's statute being almost *verbatim* the same. But to follow the decisions in *Prescott v. Prescott*, 7 Metcalf, 141; *Thayer v. Willington*, 9 Allen, 295, and *Smith v. Curtis*, 5 Dutch. 345, and other cases in those States of like import, would unsettle the law as it has been held and acquiesced in in this State since 1849, when the law was passed, and long before; and would be according to the statute an object and effect not heretofore ascribed to it or understood. Some of the cases cited fully sustain the contention of the residuary devisees, that in those States statutes like ours have been held to *entirely abrogate* the distinction between real and personal property so far as the operation of a will on them is concerned. In Pennsylvania and New York, however, where similar statutes exist, an entirely different conclusion has been reached. There, in the absence of a section like the 25th sec. of 1 Vict. ch. 26, the courts have held, that the old distinction was not wholly destroyed, but it applied only to after-acquired property. (*Massey's Appeal*, 88 Pa. 470; *Waring v. Waring*, 17 Barbours, 552; *Vankleeck v. Dutch Church*, 20 Wendell, 469.)

The cases of *Patterson v. Swallow*, 44 Pa. 486; *Williams v. Neff*, 52 Pa. 329, and *Yard v. Murray*, 5 Norris, which were relied on so confidently by the appellants, the residuary devisees, and which cases announced a similar doctrine to the decisions of Massachusetts and New Jersey, already cited, have been unqualifiedly overruled by *Massey's Appeal*, 88 Pa., where the court say, that the statements of the judge in those cases, with respect to the effect of the statute, were entirely aside the question before them; and adjudged the statute to have no such effect as was ascribed to it.

The cases from Ohio, Illinois, New Hampshire and Maine, cited in argument, were all cases where after-acquired property was involved, and the decisions went no further than to construe and decide the effect of the statutes thereon. We have

been able to find but one other case (outside the States where the 25th section of 1 Vic. ch. 26, has been adopted) where a question similar to the one presented here has been considered, and that is *Tatum v. McClellan*, 50 Miss. 1, where it was held that the heir took a void devise. In that State after-acquired property may pass by the will.

The decision of *Tongus v. Nutwell* was rendered upon a will long antedating the act of 1849. But the cases of *Deford v. Deford*, 36 Md., and *Orrick and Wife v. Boehm*, 49 Md., were upon wills made after that act was operative. In *Deford's Case* it was a concession of counsel on both sides, that void devises went to the heir at law; and it is true that the mind of the court does not appear to have been drawn to the possible effect of the act of 1849, ch. 229. But in *Rea v. Twilley*, 35 Md. 409, the construction of the act of 1849, and its effect upon devises of after-acquired property, was before the court, and the court said, that standing alone, the residuary clause was comprehensive enough to carry the after-acquired property; but that it would appear from the whole will, the residuary clause was not intended to embrace real estate, and that the heir was not to be disinherited unless the intention was clearly shown. It re-affirmed the doctrine, therefore, that the presumption was in favor of the heir at law, notwithstanding the act of Assembly under consideration. It was, to that extent, therefore, the assertion of exactly the contrary doctrine contended for by the appellants (the residuary devisees), whose contention is, that the statute changes the presumption, and shifts the *onus*. The effect of the decision in the *Rea & Twilley Case*, is to re-assert presumption in favor of the heir, and to re-state the doctrine that the intention is the main object of search in the construction of wills. In none of the cases in this court involving the construction of the act of 1849, ch. 229, from *Magruder & Frick v. Carroll*, 4 Md. 335, to *Rea v. Twilley*, 35 Md., has it been suggested that the act had any other object or effect than to give to wills the effect of carrying after-acquired property, if the terms of the will were sufficiently comprehensive, and a contrary intent was not apparent in the will. The point now made and relied on, has never before

been made in this court. As it does not appear in the will, that the testatrix desired the residuary devisees to take the property in question, and, as is said by the judge of the Circuit Court in his opinion, a different intention being naturally inferrible from the effort to give the property to other persons, and devote it to a charitable object, we do not feel warranted, by force of the statute alone, to say that the void devises pass to the residuary devisees. For the reasons stated by the judge of the Circuit Court, and these in addition thereto, we must affirm the decree.

Affirmed with costs, and cause remanded.

Who take void devises.—Statutes in several of the States provide that upon the death of the devisee before the testator, if he be a son or other relative of the testator, his lineal heirs take their father's estate. Some statutes confine the provision to the lineal heirs of a son or grandson. Some extend its operation to all the heirs, and some abolish entirely the doctrine of lapse in case of the death of the testator. *Moore v. Dimond*, 5 R. I. 121; *Sheets v. Grubb*, 4 Metc. (Ky.) 340.

In England the statute of wills provides that, unless a contrary intention shall appear by the will, lapsed and void devises shall be included in the residuary clause, if any there be contained in the will. 1 Vict. c. 26, § 25.

Section 33 of this statute, which has been very generally copied in the various statutes on the subject in the United States, provides that devises in tail, and devises to children or other descendants who leave issue, shall not lapse.

The rule of the common law, independent of the statutory modification, that void and lapsed legacies go to the residuary legatee, and void and lapsed devises to the heir, has been followed generally in the United States. Numerous cases in the reports of every State assert these doctrines. Scarcely any other rule of law has been more universally insisted upon. *Cox v. Harris*, 17 Maryland, 23; *Hays v. Wright*, 43 Id. 122; *Green v. Dennis*, 6 Conn. 292; *Lingan v. Carroll*, 3 Har. & McH. 333; *Brewster v. McCall's Devises*, 15 Conn. 297; *D. & F. Missionary Appeal*, 30 Penn. St. 425; *Vankleeck v. Dutch Church*, 20 Wend. (N. Y.) 427; s. c. 6 Paige, 600; *Cunningham v. Cunningham*, 18 B. Mon. 22; *Roberson v. Roberson*, 21 Ala. 278; *Murray v. Yard*, 12 Phila. 441; s. c. 86 Penn. St. 113; *Williamson's Estate*, 12 Phila. 64; *Heald v. Heald*, 56 Maryland, 300; *Stonestreet v. Doyle*, 75 Va. 356; *Moore v. Sanders*, 15 S. C. 440; s. c. 40 Am. Rep. 703; *Holbrook v. McCleery*, 79 Indiana, 167; *Hodson*

v. Gray, 58 Miss. 882; Gill v. Mining Co. 92 Illinois, 249; Starkweather v. Bible Society, 72 Id. 50; Dougart's Succession, 80 La. Ann. Part 1, 268.

In New Jersey all lapsed, void, and illegal legacies fall into the residuum, but if a gift of the residue fails wholly or in part it goes to the next of kin. Burnet v. Burnet, 80 N. J. Eq. 595; s. c. 1 Am. Prob. 539.

See on this point, for a similar ruling, De Peyster v. Clendinning, 8 Paige, 295; Williams v. Neff, 52 Penn. St. 326; Reed's Estate, 82 Id. 428; Wisner v. Barrett, 4 Wash. C. C. 631; Hamlet v. Johnson, 26 Ala. 557.

Statutes in the United States embodying the doctrine of 1 Vict. c. 26, § 33, have been held to apply in cases where the legatee or devisee was dead at the time the will was made. Nutter v. Vickery, 64 Maine, 490, Minten's Appeal, 40 Penn. St. 111.

Certain legacies having failed through incapacity of the legatees to take, it was held in New York that these legacies should go to the next of kin rather than to the residuary legatee. Stevenson v. Orphan Asylum, 27 Hun, 380.

Void devises to charitable institutions, also, in New York, go to the next of kin. Greer v. Belknap, 63 How. Pr. 390; Kearney v. St. Paul Society, 10 Abb. N. Cas. 274.

In Pennsylvania the statute makes real estate pass by a general devise, but when the devise has lapsed it descends to the heirs, and forms no part of the residuum, unless a special intent to the contrary is manifest. Massey's Appeal, 88 Penn. St. 470; 1 Am. Prob. R. 307.

CASKIE vs. HARRISON.

[76 Virginia, 85.]

SAME PERSON SURVIVING PARTNER AND EXECUTOR OF COPARTNER.

—JOINT BONDS OF EXECUTORS.

Where the same person is surviving partner and executor of his copartner and has funds in hand not needed to discharge firm debts, he is bound to pay them to himself as executor, and for a failure so to do his sureties are responsible.

In a joint bond by executors each is principal as to his own acts, and surety as to those of his companion.

APPEAL from a decree of the Chancery Court of Richmond city.

John Caskie died in September, 1867, being a member of the firm of J. & J. K. Caskie, composed of himself and James K. Caskie his son, tobacco merchants, in Richmond.

John Caskie left a will appointing James K., Robert A., and William H. Caskie, his three sons, executors. They all qualified and gave a joint and several bond without sureties, none being required by the will. The firm owed no debts. At the death of John, James owed the estate \$10,000. Between his death and September, 1868, James collected firm assets to the amount of \$62,000, nearly all of which he lost in cotton speculations. James advanced to the firm of Caskie & Brothers, of which he was a member, \$43,608 92, part of the late firm's assets held by him as surviving partner, and in 1868 withdrew \$40,000 thereof, which he lost in similar speculations. In September, 1868, James K. Caskie died testate, leaving no personal estate, and his brothers Robert A. and William H. Caskie qualified as executors.

The plaintiffs sued as legatees under the will of John Caskie for payment of their legacies and to have a settlement of the accounts of Robert A. and W. H. Caskie, as surviving executors of John Caskie and James K. Caskie, and of the accounts of James K. Caskie as surviving partner.

The Chancery Court decreed that for the funds of the estate of John Caskie, deceased, which came into the hands of James K. Caskie, whether as surviving partner or otherwise, the latter was liable in his capacity as executor of John Caskie, and that Robert A. and William H. Caskie were also liable as sureties in their joint executorial bond, and that R. A. & W. H. Caskie were liable also for balance due by Caskie & Bros., composed of themselves and James K. Caskie, to J. & J. K. Caskie, or to estate of James K. Caskie; and that they and John N. Caskie are liable for balance due by Caskie & Bros., composed of themselves and John N. Caskie, to J. & J. K. Caskie, or to the estate of James K. Caskie, deceased.

From this decree the said Robert A. Caskie and William H. Caskie, executors as aforesaid, obtained an appeal to this court. The remaining facts and points relied on are fully stated in the opinion of the court.

John A. Meredith, for appellants.

James Pleasants, for appellees.

STAPLES, J. This cause has been very ably argued orally and in writing. It is important both as respects the principle involved and the amount in controversy. In discussing the several questions presented for our consideration, it will be convenient to consider them in the order in which they have been treated in the petition for an appeal. The first is, whether James Caskie is to be held answerable as executor, or merely as surviving partner, for the funds which came into his hands after the death of John Caskie, and which are the subject of this controversy. By the terms of the partnership between John and James Caskie, it is to be regarded as continuing till the 1st of January, 1868, notwithstanding the death of John Caskie in September, 1867. After the first of January, 1868, then James Caskie is to be deemed a surviving partner of the firm of J. & J. K. Caskie, and as such he was invested with the exclusive right to the possession, control and management of the partnership property, only so far, however, as was necessary to enable him to wind up the business of the concern with all practical promptness and dispatch. His duty was first to pay the partnership debts, and if there were none, then to distribute the surplus among those entitled. (Story on Partnership, §§ 343-4, 341.) Whilst the surviving partner has the legal right to the possession of the effects, in equity he is considered merely a trustee to pay creditors and to dispose of the remaining assets for the benefit of himself and the estate of the deceased partner. In the discharge of this duty he is held to account with all the strictness of an ordinary trustee. (5 Wait's Actions and Defenses, 143, and cases cited.)

It appears that at the death of John Caskie, James Caskie was indebted to the firm in the sum of \$10,000 in round numbers. Between the death of John Caskie and the month of September, 1868, James Caskie collected funds belonging to the firm to the amount of about sixty-two thousand dollars, nearly all of which were in the year 1868 embarked and lost

by him in private cotton speculation. I do not profess to be absolutely accurate in the sums stated ; they are sufficiently so for all the purposes of this decision. Now, it is obvious that whatever may have been the trouble or delay in disposing of the tobacco in foreign ports, about which so much has been said by counsel, there could have been no sort of difficulty or obstacle in the way of a proper disposition of the funds actually received by James Caskie, and converted by him to his own private use. He was in possession of all the books, accounts and papers of the concern, and must be presumed to be familiar with its condition, assets and liabilities. He was also in possession of the funds as surviving partner, after the 1st January, 1868. He knew, certainly, that the partnership owed no debts, and all he had to do was to divide the money, as it was from time to time received, between himself and the estate of his deceased partner. There was nothing in the circumstances by which he was surrounded to prevent a transfer from James Caskie, as surviving partner, to himself as executor of John Caskie, of so much of the funds so received as belonged to him in his fiduciary capacity. In accepting the office of executor, and taking upon himself the active management of the assets, he assumed the responsibility of collecting, as executor, the amount due by himself as surviving partner. With what sort of justice can he or his representative insist that the money might have been needed for partnership purposes, when he himself deliberately drew it out of the concern and expended it in private speculations ?

After advancing to the concern of Caskie & Brothers, of which he was a member, the large sum of \$48,000, money held by him as surviving partner ; after withdrawing more than \$40,000 of the amount and literally throwing it away in disastrous adventures, upon what ground can it be maintained for him that he as surviving partner could not safely pay that sum to himself as executor ? As was said by Judge Joynes in *Harvey's Adm'r v. Steptoe*, 17 Gratt. 300 : " When Thomas Steptoe, who was sole acting trustee and sole acting administrator, sold the trust property, after the death of James Steptoe, it became his duty to pay to himself, as trustee under the will, so much of

the surplus money remaining after the payment of the debts secured by the deed as arose from the sales of the real estate, and to pay to himself, as administrator, so much of the said surplus as arose from the sales of the personal estate or the collection of debts. Upon well-settled principles, the amount thus payable to himself as administrator was assets in his hands as such, for which his sureties were responsible. There was no need of any election on his part to make the transfer, in order to fix the liability of the sureties. It was his duty to make it, and he could not lawfully refuse to do so after the purposes of the deed were satisfied."

The rule laid down by Judge Joynes is a well-established doctrine of courts of equity. The learned counsel for the appellants relied with much seeming confidence upon *Smith v. Gregory*, 26 Gratt. 248. No new principle was, however, announced in that case. It decided that where the same person is both guardian and executor the court will not shift the responsibility from one set of sureties to another without some act or declaration on the part of the executor indicating an intention to transfer the assets to himself as guardian. It further decides that an executor who has wasted the assets cannot, upon his subsequent qualification as guardian, relieve his sureties upon his executorial bond by electing to transfer his liability as executor to his account as guardian. This doctrine has of course no application to a case in which the surviving partner, being also executor, has the assets actually in his hand, which, not being needed for partnership debts, ought to be paid to himself as executor. In *Morrow v. Peyton*, 8 Leigh, 54, this court held that where the estate of one intestate is indebted to the estate of another intestate, and the same person is administrator of both, and wastes the assets which he ought to have paid over to the creditor estate, the sureties for the due administration of the creditor estate are liable for the misapplication. This rule of law was approved in *Smith and Gregory*, and it is in perfect harmony with the decision in that case.

In *Commonwealth v. Gould*, 118 Mass. 307, Chief Justice Gray thus clearly states the rule in question: "The receiver was bound by his bond to account for the money borrowed by

him from the corporation before his appointment, and his omission to pay the amount thereof to himself as receiver was a breach of the bond for which he and his sureties are equally liable. The case falls within the general rule of law that where the same person is liable to pay money in one capacity, and to receive an account for it in another, the law presumes that he has done what was his duty and within his power to do, and holds him and his sureties responsible in case of failure to do it." In support of this proposition the learned judge cites a number of cases. The same principle applies where, as in this case, the executor is indebted to the estate of his testator at the time of his qualification. In such case, the executor, having voluntarily assumed the trust, prevents any other person from receiving it, and being unable to sue himself, he is considered having paid the debt; and holding in his hands the amount, as executor—it being the same hand which ought to pay that is to receive—it is therefore considered as actually paid. (*Winship v. Bass et al.* 12 Mass. 202; *Griffith v. Chew's Ex.* 8 Serg. & Rawle, 32-3; 2 Willaims on Executors, p. 1419; and cases cited in notes.)

As was well said by Chief Justice Shaw in *Stephens v. Gayland*, 11 Mass. 459: "There is no ceremony to be performed in paying the debt, and no mode of doing it but by considering the money to be in his hands as executor." And in *Brown et al. v. Lambert*, 33 Gratt. 268, Judge Burks, speaking with respect to the trustee in that case, said: "He could not have been expected to sue himself to compel payment; but he could have charged himself as trustee for the trust fund of which he was debtor. Whether he so charged himself or not, the law charged him, and the charge constitutes a debt due by him as trustee for persons under disabilities within the meaning of the statute."

These authorities would seem to be decisive of the question before us. They conclusively show that the liability of James Caskie for the funds wasted by him attaches to him, not as surviving partner, but in his character of executor of the estate of John Caskie.

The next question is, whether the appellants are liable as

sureties upon the official bond of James Caskie for his misapplication and waste of the assets in his hands as executor.

John Caskie, by his will, appointed James Caskie and the appellants his executors, and he directed that no security should be required of them for the faithful discharge of their duties.

Accordingly, upon their qualification, they executed a joint and several bond without security. In the order of the court admitting the bill to probate, it is recorded that the executors had given bond, but without security, the will directing that none should be required of them. The ground taken by the counsel for the appellants is that the appellants cannot be charged as sureties, because the testator directed that no security should be required of his executors, and in the order it is expressly declared that none was required, the testator having dispensed with it; that the bond derives its force and effect from the order, and can impose no obligation in conflict with it, and therefore to construe the bond as creating the relation of principal and surety between the obligors is to give it an effect never contemplated by the testator, and inconsistent with the order of court from which it derives its sole efficacy as a binding instrument.

This is a very meagre statement of the very able and ingenious argument of the learned counsel for the appellants. It is upon this point he rests his hope of success in the case. Before examining it, it is necessary to ascertain what is the rule of law in respect to the operation and effect of joint and several bonds of executors and administrators for the faithful discharge of their duties. In *Morrow v. Peyton*, 8 Leigh, 54, it was held that where two administrators executed a joint administration bond each is to be regarded as the surety for the other, and if one commit a *devastavit* the other is chargeable for his acts as surety.

The learned counsel insists that the decision was made by two judges in court of three—Judge Brooke dissenting. This is true; but the doctrine laid down in that case has been again and again recognized by this court. (*Boyd's Ex'rs v. Boyd*, 8 Gratt. 112; *Cox v. Thomas*, 9 Gratt. 319.)

In the last mentioned case Judge Allen said, that *Morrow v. Peyton* had been followed since in other cases, and as the legislature had not thought proper to interfere with the rule there laid down, although there had been a general revision of the law since that decision, it ought not now to be considered an open question. This was in 1852, and no case can be found since in which the rule thus established has been overruled, or even controverted. The same doctrine was laid down by Chief Justice Marshall in *Green v. Hansbrough* and *Seddens v. Robertson*, 2 Brock. R. 166, 402, and is supported by numerous decisions elsewhere. (Red. on Wills, part 2, p. 82, note 14.)

It may, therefore, be considered as settled that where two or more executors or administrators execute a joint bond, they are to be considered as standing in the relation to to each other of principal and surety, each being considered principal as to his own acts, and surety as to the transactions of his companion.

We come now to inquire whether there is anything in the present case which takes the executorial bond out of the operation of this well-established rule. It is very clear that the intention of the testator was that his three sons should jointly qualify, and jointly execute the trusts of the will. He could have had no other object in appointing the three his executors. At common law executors have a joint authority and a joint interest in the property. They are esteemed in law as but one person, and as such represent the testator, although each may be responsible only for his own acts, and not for those of his co-executor. It was, no doubt, to this joint qualification and this joint authority the testator was looking when he declared that his executor should not be required to give surety. Having entire confidence in his sons, and supposing they would all act in executing the will, his purpose was that they should qualify without calling in any third person as surety for the faithful discharge of their duties. He certainly could not mean they should not give a joint bond if they chose to do so, nor did he undertake to define or limit the effect of such bond if given. It is very probable he never bestowed a thought on the subject. Every one can see that the object of the court was to carry out the wishes of the testator. The order of probate

is a mere recital of what has been previously done, and a statement of the reasons which influenced the court in dispensing with the usual security required of personal representatives. The bond does not, as seems to be supposed, derive its efficacy from the order.

It would be a valid and binding instrument, even though the record had been silent with respect to its execution. In *Cecil v. Early*, 10 Gratt. 188, this court held that the sureties of a deputy sheriff on his bond to the high sheriff are estopped to deny that the principal was deputy, although the county court did not enter of record that the deputy was a man of honesty, probity, and good demeanor, and that he took the oaths required by law. This decision was made in the very teeth of a statute declaring that a deputy sheriff should not perform any of the duties of his office until such oaths were taken and such entry made of record. In *Franklin v. Depriest*, 13 Gratt. 257, it was held that where the bond of an executor is made payable to four parties named, one of whom was not a member of the court at the time, yet, as the justices had declared and acknowledged that the four justices named were justices then sitting, they were estopped to deny the fact, although it was in direct contradiction of the record. (See also *Wonlath v. Coms*, 15 Gratt. 157.) These cases show that where the court has authority to take a bond from a fiduciary, the nature and extent of the liability assumed by the parties is ascertained by the bond itself, and not by any mere order of court reciting the fact of its execution. In the case before us the instrument is plain and unambiguous in its terms. In construing it no resort to extraneous circumstances is necessary. It is a joint and several obligation, binding each and all of them, parties to a faithful administration of the assets. As such it is not at all inconsistent with the order of the court; for although the court might, in conformity with the wishes of the testator, allow the three executors named to qualify and give bond without surety, it did not prohibit them from entering into a joint obligation, and thus assuming among themselves the relation of principal and surety, if they voluntarily choose to do so. As such it was accepted by the court, and no order

afterwards entered on another day or on the same day can change or modify its legal operation and effect. Persons interested in the estate, upon looking, at the bond, would discover that the executors were bound for the acts of each other, and might therefore be content with the security thus furnished. It was said by Judge Allen, in *Gibson v. Beckham*, 16 Gratt. 334: "These principles are essential to the security of the public and individuals. Bonds of clerks and other officers of administration are taken in the absence of those who may be most affected by the acts of such functionaries, and should be sustained unless clearly made invalid by law."

For these reasons I am of opinion that these appellants are bound as sureties for the misapplication of the assets by James Caskie as executor.

All that has been said in this opinion applies as well to the sum of \$42,608 92, part of the funds advanced by James Caskie to the partnership of Caskie & Brothers, as to any of the assets misapplied by him. As already stated, this money was collected by James Caskie as surviving partner of J. & J. K. Caskie, was placed by him to the credit of Caskie & Brothers, was afterwards, in the year 1868, to the amount of \$40,301 59, drawn out of that concern by James Caskie and expended by him in cotton speculations.

According to the views already presented, the appellants are liable for the *devastavit* as sureties of James Caskie upon his executorial bond; and so the chancellor decided. He was, however, also of the opinion that the appellants are chargeable with this fund primarily as executors of John Caskie. This question it seems to me, is not now so material to be decided, inasmuch as the appellees in obtaining a decree against the appellants as sureties, have obtained all the substantial fruits of the controversy. If, however, it was necessary to determine the point, I am not satisfied the appellants are answerable for this fund primarily as executors. Upon well settled principles of law, where there are two or more executors or administrators, each has a several right to receive the assets of the estate, and he alone is consequently liable for what is so received. As a general rule, therefore, one executor cannot be charged with

the *devastavit* of his companion any further than he is shown to have been knowing and assenting at the time to the *devastavit*. Merely permitting his executor to possess the assets without going further and concurring in the misapplication, does not render him responsible for the receipts of his co-executor. (*Frazier v. Bevil et al.* 11 Gratt. 98; *Peters v. Boresly*, 11 Peters, 503.)

An executor may be held liable if, by his own laches or neglect, he suffers his companion to receive and waste the assets when he has the power to prevent such receipt and misapplication by the exercise of reasonable diligence.

In *Williams v. Nixon*, 3 Beav. 472, Lord Langdale said: "There can be no doubt that if an executor knows that the moneys received by his co-executor are not applied according to the trusts of the will, and stands by and acquiesces in it, without doing anything on his part to procure the due execution of the trusts of the will, in respect of the negligence he himself will be charged with the loss. . But in cases of this kind, it is always to be observed that the testator himself, having invested certain persons with the character of executors, has trusted them to the extent to which the law allows them to act as executors."

He further said he "knew of no case in which the court has gone to the length of saying that an executor shall be held primarily answerable for standing by and permitting his co-executor to do that which, for anything he knows to the contrary, was a performance of the trusts of the will." In the case before us there may be a strong suspicion that the appellants were apprised that James Caskie was using trust funds in his cotton speculations, but there is no positive proof of the fact, direct or circumstantial. The strongest argument against them is, they had every reason to believe that James Caskie was not possessed of means of his own to carry on these speculations. But this is a mere matter of inference, not founded upon any satisfactory proof. If they had access to the partnership books of Caskie & Brothers, which were under the control and management of James Caskie, these books furnished, according to Mr. Pleasants, no specific or reliable information on the sub-

ject. This witness, in answer to a question propounded to him, said "that the books not being posted, the appellants could have no accurate information as to the condition of either concern; nor is there anything in the books or papers to show, as far as he knew, that the appellants knew of this use of the money of John and James Caskie."

Indeed, the testimony of Mr. Pleasants shows that if the appellants were apprised of the waste and misapplication of the assets by James Caskie, it must have been from outside sources exclusively, and of this there is not the slightest proof in the record.

My opinion therefore is, that the evidence does not show any such knowledge, *laches*, or neglect on the part of the appellants, with respect to the misapplication of the assets by James Caskie, as fixes upon them a liability in their character as executors.

Are they responsible as copartners in the firm of Caskie & Brothers? This question is even less material than the other. For the decree against the appellants as copartners adds nothing to the surety of the appellees. As, however, the chancellor has passed the point, I suppose we also must decide it. What has been already said shows, or tends to show, that the appellants were not informed of the conduct of James Caskie in advancing the funds in his hands as surviving partner to the firm of Caskie & Brothers.

That these funds were not applied to the use of Caskie & Brothers is very clear. Mr. Pleasants says, after a careful examination of the books, he finds that the firm could have used but a small part of the sum charged to that firm by James Caskie—say, between \$2,000 and \$3,000. For while James Caskie charged the firm of Caskie & Brothers with a balance of \$42,608 92, he drew from that firm for his own use, and within the space of a few months, and charged to himself a sum nearly as large—say \$40,301 59. It is claimed, however, that the transaction constituted a loan by James Caskie to the firm of Caskie & Brothers, and it is therefore quite immaterial whether the appellants knew of the deposit, or whether the firm did or did not derive any benefit from it.

Let us suppose, then, that James Caskie was before the court asserting the alleged loan ; the answer to his demand would be that he had drawn out of the concern the larger portion of the amount advanced by him, and had appropriated it to his individual use. And this would be quite a sufficient answer to the demand. As between James Caskie and the appellants the transaction may have been a loan, but not as between the appellants and the appellees. If the latter have any valid claim to a recovery, it is upon the ground of a fraud or breach of trust committed by James Caskie in investing trust funds in the concern of Caskie & Brothers.

Now, I take it, to make good this claim it must appear either that the appellants, as copartners, knew of the misapplication and in some way participated in it, or that the funds were applied to partnership purposes. In *Ex parte Heaton*, Brock, 386, a father and his sons were partners, and the three sons were trustees under a will, and instead of applying the trust moneys according to the trust they appropriated them to partnership purposes, and it was held that the firm could not be held liable unless it could be shown that they were employed for the use of the partnership trade with the knowledge of the father that they were trust funds. And in 1st Collyer on Partnerships, section 457, it is laid down that it is not sufficient the firm has had the benefit of the trust moneys. To be liable the firm must be implicated in the breach of trust, and this cannot be unless all the partners knew whence the money came or knew that the money did not belong to the partner making use of it.

This is carrying the doctrine much further than is necessary for any of the purposes of this case, and I do not wish to be understood as approving it as thus broadly laid down. Certainly, parties complaining of the misapplication of trust funds ought to show that the partnership is implicated in the breach of trust, or that it has derived some benefit from the transaction. It has been already seen that neither of these facts appear in the present case. Whilst, therefore, the appellants are liable as copartners for the \$2,000 or \$3,000 mentioned by Mr. Pleasants, I do not think they are responsible for the funds

drawn out by James Caskie and converted to his own use and benefit.

The next ground of error is that the Chancery Court improperly charged the appellants with the balance appearing to be due by them individually in the books of J. & J. K. Caskie.

It is insisted by them that under an agreement with John Caskie, the father, they are entitled each to one-fifth of the profits in the concern of J. & J. K. Caskie.

The difficulty with the appellants is, that they have no proof of the existence of the alleged agreement. It will not be seriously maintained for a moment that either of them is a competent witness to establish such a contract with the testator. The testimony of Mr. Waldrop shows merely that John Caskie said it was his purpose to allow each of his sons (Robert A. and William H. Caskie) one-eighth interest in his business out of his own individual interest in the concern.

It would seem from this, Mr. Caskie's purpose was to allow each one-eighth, and not one-fifth, as now claimed by the appellants. But whether one-eighth or one-fifth, it was the expression merely of an intention on the part of Mr. Caskie.

The witness does not prove, nor did Mr. Caskie state, there was any contract between himself and his sons, or even any promise on his part to make the alleged allowance. Such a declaration made by Mr. Caskie would, of course, be a mere *nudum pactum*, which he might or might not carry out at his pleasure. In the will of Mr. Caskie there is not the slightest reference to any such purpose on his part, and it is manifest to allow these appellants each one-fifth claimed, would be to violate the whole scheme of equality prevailing that instrument. Nor is there on the books or the papers of the partnership of J. & J. K. Caskie any memorandum or allusion whatever tending to show the existence of the alleged agreement, or promise on the part of John Caskie. Whilst he has regularly charged the appellants with the advances made to them, he has not put upon his books any credits for the profits they now claim as a set off against these advances.

This record shows, and, indeed, it is conceded on all sides, that Mr. Caskie was a man of the strictest integrity and of a high order of business talent. It is difficult to believe that had there been any such understanding as is now alleged Mr. Caskie would not have left behind him some proof of the fact—some entry or statement tending to show it. There are other facts and circumstances which strongly militate against the claim of the appellants. But it is unnecessary to consume time in mentioning them. Enough has been said to show the utter want of competent evidence to establish the claim set up by the appellants.

Before concluding the opinion, it is proper to say that there are two preliminary objections taken by the appellants to the proceedings of the court below.

If these objections were tenable, I do not see in what manner they would affect or modify the decision so far as the merits of this controversy are concerned.

The objections are, however, not sound, as is demonstrated by the printed argument of the appellees' counsel. I do not deem it necessary to discuss them, as this opinion has already extended to a great length. Subject to the exceptions already mentioned, the decree of the Chancery Court must be affirmed.

Decree affirmed.

AMHERST COLLEGE vs. SMITH.

[134 Massachusetts, 543.]

LEGACY CHARGED ON LAND.—BOND BY EXECUTOR AND DEVISEE
FOR THE PAYMENT OF ALL DEBTS.

If the executors of a will give a bond for the payment of all debts and legacies, the real estate devised to one of their number is not thereby discharged from the lien of a legacy charged thereon, and a *bona fide* mortgagee of the devisee cannot compel the legatees to exhaust the residuary estate on their remedies in the bond before proceeding against the land.

BILL in equity.

Austin Smith died leaving a will in which he devised certain land, of which he was seized, to his son John M. Smith, "provided, and it is a condition of this bequest, that the said John M. shall, at the expiration of two years from my decease, pay to my granddaughter Mary B. Smith, daughter of Elihu Smith, the sum of one thousand dollars; and shall also pay to my son, Elihu Smith, the sum of four thousand dollars, to be held by said Elihu in trust, as hereinafter provided." He also provided: "To my son, Elihu Smith, I give and bequeath the sum of four thousand dollars, to be paid to him by my son, John M. Smith at the expiration of three years from my decease; to have and to hold the same until the expiration of eight years from my decease in trust, for the following purposes: the yearly income, until the expiration of the eight years aforesaid, to be divided equally between my said sons, Elihu and John M., and the principal (four thousand dollars) at the expiration of the said eight years, to be paid over in equal portions, share and share alike, to my grandchildren who may be then living, excepting Mary B. Smith, daughter of Elihu Smith, who I have otherwise provided for. The foregoing legacies to my grandchildren, including that to my granddaughter Mary B. Smith, are subject to this condition, that in case any one of my said grandchildren shall die before arriving at the age of twenty-one years, his or her portion shall be divided equally among the survivors, share and share alike."

John M. Smith, N. A. Smith and Elihu Smith, were appointed executors and residuary devisees and legatees.

The bill charged that John M. Smith mortgaged the lands devised to him to plaintiffs with covenants of warranty; that he has never paid the legacies charged on the land, that the executors have no funds to pay the legacies and that defendants claim a lien on the land for such legacies prior to the mortgage, and, with the exception of the executors, have brought a writ of entry against plaintiff. The land is not worth enough to pay the legacies and mortgage.

Judgment was asked restraining defendants from enforcing their legacies against the land until they had exhausted the as-

sets in John M. Smith's hands and their remedy in the probate bond.

Defendant demurred for want of equity.

J. C. Hammond & J. I. Cooper, for plaintiffs.

F. G. Fessenden, for defendants.

C. ALLEN, J. If it be assumed, as contended by the plaintiffs, that the sum of \$1,000 and \$4,000 directed to be paid to Mary B. Smith and Elihu Smith, trustee, respectively, are to be considered as legacies, which the executors would be bound to pay from the general estate of the testator, in case, for any reason, the same could not be realized from the land devised to John M. Smith, or from John M. Smith, personally, still it by no means follows that the giving of the bond by the executors for the payment of all debts and legacies would have the effect to vest in John M. Smith an absolute title to the land, which he could convey to a *bona fide* purchaser, free and clear of the lien for the legacies. Such a bond is a substitute for the estate of the deceased, and conclusively admits assets sufficient to pay all debts and legacies which the executors are bound to pay. But if a testator expressly charges a legacy on a particular piece of land, which is specifically devised subject to the charge, or if he imposes on a particular devisee the personal duty of paying the legacy, as the condition on which he is to take a specific devise of land, in such case the giving of a bond by the executors with condition to pay all debts and legacies will not have the effect to discharge the lien on the land which is created directly by the will itself, or to supersede the duty of the devisee to pay the legacy. It is, at most, but a supplementary obligation and security. The burden and duty will still rest primarily on the estate devised, and on the devisee; and only secondarily on the general estate of the testator, and upon the sureties on the executors' bond. Nor is the case different where such devisee happens to be one of several executors. The burden and duty still rest on him in his capacity as devisee, and upon the particular estate which is devised to him. The liability of the ex-

ecutors as such, if it exists at all, is only secondary. The bond is not a substitute for the particular parcel of land devised, or for the personal duty of the devisee. Such a case is quite different from one where the legacies are payable only from the general estate of the testator, as in *Clarke v. Tufts*, 5 Pick. 336, 340.

In the present case, the land devised to John M. Smith on condition of his paying the sums in question became thereby charged with the payment of them. These sums being distinctly mentioned in the will, a purchaser of the land must see that the purchase money is applied to their payment. (2 Sugd. Vend. [8th Am. ed.] 658; Lewin on Trusts [7th ed.] 413; 2 Story's Eq. Jur. §§ 1127, 1132, 1133; *Andrews v. Sparhawk*, 13 Pick. 393; *Goodrich v. Proctor*, 1 Gray, 567, 570; *Leavitt v. Wooster*, 14 N. H. 550; *Hallett v. Hallett*, 2 Paige, 15.) John M. Smith was also, by his acceptance of the devise, bound personally for their payment. (*Loder v. Hatfield*, 71 N. Y. 92; *Birdsall v. Hewlett*, 1 Paige, 32; *Harris v. Fly*, 7 Paige, 421, 427; *Gardner v. Gardner*, 3 Mason, 178, 209; *Sands v. Champ- lin*, 1 Story, 376, 383; *Merrill v. Bickford*, 65 Maine, 118; *Corwine v. Corwine*, 9 C. E. Green, 579.)

At the time the bond was given, the sureties knew, or must be deemed to have known, that the payment of these sums rested primarily on the land, and on the devisee thereof, and that the land should be followed into the hands of a purchaser. They had a right to assume that a purchaser would see to the proper application of the purchase money. So, on the other hand, at the time the plaintiffs took their mortgage, they must be deemed to have been aware of all these facts, and to have understood that the liability of the general estate of the testator, and the obligation of the sureties upon the bond, were at most but supplementary, and that the sureties, if compelled to pay these sums, would be subrogated to the right of the legatees to follow the land.

Under these circumstances, the plaintiffs had no equity to compel the legatees to seek payment from the residuary estate, or from the sureties on the bond, rather than from the land. It is, therefore, unnecessary to consider at all the important question whether these sums could in any event be deemed legacies,

in such sense that they would be payable by the executors, and so be covered by the bond, in case the devised land and the personal responsibility of John M. Smith should prove insufficient for their payment.

Bill dismissed.

PATTERSON vs. PAGAN.

[18 South Carolina, 584.]

SUIT BY FOREIGN EXECUTOR.

A foreign executor cannot bring an action in this State until he has taken out letters testamentary.

THE facts appear in the opinion.

John S. Reynolds, for appellant.

T. C. Gaston, opposed.

MCGOWAN, J. This was an action by the plaintiffs, as executors of the will of Robert Patterson, deceased, late of Pennsylvania, originally brought against John D. McCarley, sheriff of Fairfield county, to recover the proceeds arising from the sale of certain crops seized and sold by him as sheriff under a warrant to enforce an agreement for rent of land executed by James Pagan to Robert Patterson, deceased. More than "thirty days" had elapsed between the said sale and the commencement of this action. By an order of June, 1882, James Pagan was interpleaded as a defendant, and answered.

The trial was had at the September term, 1882. The complaint alleged that "Robert Patterson, then a resident of the State of Pennsylvania, departed this life, leaving in full force his last will and testament, wherein the said Robert E. Patterson, W. Heyward Drayton and Henry P. Smith, the plaintiffs, were appointed his executors, and that said will having been

admitted to probate in the State of Pennsylvania, was duly admitted to probate and filed in the office of probate judge of Fairfield county, in the State of South Carolina; and that the said executors have heretofore qualified and entered upon the discharge of their duties." The defendant answered, denying that the plaintiffs had legal capacity as executors to sue in this State.

It appeared by an exemplification of the proceedings that the will of Robert Patterson was duly admitted to probate in the proper office of the city and county of Philadelphia, in the State of Pennsylvania, and that letters testamentary thereon had been granted to the plaintiffs, as executors, on August 12th, 1881. A full copy of the proceedings in Philadelphia in probating the will had been recorded in the office of judge of probate for Fairfield county, South Carolina, indorsed, "Filed and admitted to probate December 29th, 1881," but no further proceedings were taken. The persons named as executors never qualified as such or received letters testamentary in this State. The sheriff testified that James Pagan had never filed an affidavit denying that the amount claimed was due on the lien for rent mentioned in the complaint, but before the sale of the cotton he had served written notice claiming that the cotton was his property, not subject to Patterson's lien.

The plaintiffs have rested and the defendant moved for a nonsuit on the ground that the plaintiffs had not established their legal capacity to sue. The motion was refused, a verdict rendered for the plaintiffs, and the defendant appeals to this court upon the following grounds: First. "For that his honor held that upon proving the testator's will in the office of the judge of probate, the plaintiffs become legally capable of suing in this State. Second. For that his honor held that under section 1875 of the general statutes, the plaintiffs, as executors, are authorized to prosecute this action to judgment. Third. For that his honor did not hold that to enable the plaintiffs, as executors, to prosecute this action, they must have qualified in this State according to the form prescribed in the general statutes. Fourth. For that his honor did not hold, in order to enable the plaintiffs, as executors, to prosecute this

action to judgment, they must have received letters testamentary from the Court of Probate in this State. Fifth. For that his honor did not hold that the plaintiffs have not legal capacity to sue, and dismiss the complaint.

The plaintiffs contend that the defendant Pagan has no right to make the objection of want of capacity on their part to sue, for the reason that no claim was made against him—that he was not originally sued, but the sheriff for money in hands, and Pagan claiming the same money was brought in by interpleader and thereby merely allowed to support his own claim to the money, but not to dispute others. We find Pagan on the record as the defendant, and we know of no rule of law which limits his rights as defendant on account of the manner in which he was brought in. No authority was cited to sustain the view suggested. It does not appear at whose instance he was made a defendant, but we suppose that he was substituted for the party originally sued, under the authority of the last paragraph of section 145 of the code, which provides, that at the instance of a defendant against whom a claim is made for the property in controversy, by a person not a party to the action, the "court may grant an order to substitute such person in his place," etc.

The plaintiffs also claim that Pagan could only avail himself by demurrer of the defense of want of capacity in the plaintiffs to sue. The defendant is authorized to demur when the facts which constitute the defense appear upon the face of the complaint; but if it does not show the facts upon its face, the objection can only be made by answer and proof of the facts. (Code, § 170; 2 Wait's Pr. 448.) In this case, the fact upon which the defense rested did not clearly appear upon the face of the complaint, which stated that, "the said will, having been proved and admitted to probate in the State of Pennsylvania, was duly admitted to probate, and filed in the office of the probate judge in Fairfield county, in the State of South Carolina; and that the said executors have heretofore qualified and entered upon the discharge of their duties." Without explanation, this statement might be construed to mean that the executors had qualified and entered upon their duties in South Carolina. From

the context this would seem to be the proper meaning, and a demurrer (which admits the facts as stated) might have failed to make the point intended and defeated the defense, as the proof showed that the plaintiffs never qualified and entered upon the discharge of their duties in the State of South Carolina.

The main question in the case is, whether the plaintiffs had legal capacity to sue as executors of Robert Patterson's will, upon which they had qualified and received letters testamentary in the State of Pennsylvania, but not in South Carolina. There is no doubt that the right to make a will gives the right to dispose of testator's personal property wherever it may be situated, but before there is a will at all, there must be conformity to the law of the domicile which, in most of the States, requires that the will must be in writing—free and voluntary—attested by a certain number of witnesses, and proved in an office established for that purpose. Although the power of disposal may be general, the sanction of these local laws, which are necessary to give it effect as a will, does not extend beyond the limits of the State which enacts them.

So also as to the authority of executors, which is a very different matter from the probate of the will. Even after a will has been probated, it cannot execute itself, and some agency must be created to carry it out. The testator has the right to appoint his own executors, and while undoubtedly their general authority is derived from the will, they cannot enter fully upon the discharge of their trust until they have complied with certain statutory regulations upon the subject, such as taking the prescribed oath, in some of the States giving bond, and receiving letters testamentary; and before these requirements are complied with, an executor named can exercise no power as such further than to pay funeral charges, and perhaps do such other acts as are necessary for the preservation of the estate. These requirements are necessarily local in their nature, and of course their operations are limited to the State which makes them, unless other States, from convenience or comity, adopt them as to wills executed in that State.

The rule and the reasons for it are clearly stated by Chief

Justice Marshall, in the case of *Dixon's Executors v. Ramsay's Executors*, 3 Cranch, 319, as follows: "The question in this case is, whether the executor of a person who dies in a foreign country, can maintain an action in this, by virtue of letters testamentary granted to him in his own country. It is contended that this case differs from that of an administrator, which was formerly decided in this court, because the administrator derives his power over the estate of his intestate from the grant of administration; but an executor derives it from the will of his testator, which has invested him with his whole personal estate, wherever it may be. This distinction does certainly exist; but the consequences deduced from it do not seem to follow. If an executor derived from the will of his testator a power to maintain a suit and obtain a judgment for a debt due to his testator, it would seem reasonable that he should exercise that power, wherever the authority of the will was acknowledged; but if he maintain the suit by virtue of his letters testamentary, he can only sue in courts to which the power of these letters extends. It is not and cannot be denied, that he sues by virtue of his letters testamentary; and consequently in this particular he comes within the principle which was decided by this court in the case of an administrator. All rights to personal property are admitted to be regulated by the laws of the country in which the testator lived; but the suits for those rights must be governed by the laws of that country in which the tribunal is placed. No one can sue in the courts of any country, whatever his rights may be, unless in conformity with rules prescribed by the laws of that country," etc. (See, also, *Murrell v. Dicky*, 1 John. Ch. 153; *Peterson v. Chemical Bank*, 32 N. Y. 40; *Noonan v. Bradley*, 9 Wall. 400, and *Reynolds' Executors v. Torrance*, 2 Brev. 49.)

It is clear, then, both from principle and authority, that the plaintiffs had no legal capacity to sue in this State by virtue of their letters testamentary granted in the State of Pennsylvania, but it is insisted that the foreign appointment has been confirmed by the law of this State, and therefore they had the right to sue here. This might be possible. As said by Chief Justice Simpson, in the case of *Dial v. Gary*, 14 S. C. 579:

"If the decedent has left a will, upon its being established under the *lex domicilii*, it will usually be confirmed under the jurisdiction where the property is found, and the title of the executor, as well as the disposition of the property therein appointed and directed, will be recognized here. But this confirmation must take place and be had in accordance with the laws of the *rei sitæ* before even an executor under such testament can intermeddle with the property," etc.

Is there any law in South Carolina which "confirms" the appointment of these executors, and makes them executors in this State? Section 1875 of the general statutes of 1882, relied upon by the plaintiffs and the circuit judge, provides, that, "If a will be regularly proved in any foreign court, an exemplification of such will may be admitted to probate in this State upon the exemplification and certificate of the judge of the Court of Probate, and the exemplification shall also be evidence of the devise of lands in this State when the title of lands comes in question," etc. The object of this provision manifestly was to avoid the great inconvenience of producing the original will in this State for the purpose of being used in evidence, as appears by the original act of 1759 (4 Stat. 102), which recites, that "said probate or copy so proved and attested as aforesaid, shall be deemed and held to be as good and sufficient evidence in any court of law or equity in this province as if said original will had been produced," etc. It may be conceded that under this law the will of Robert Patterson has been admitted to probate in Fairfield county of this State, but no mention whatever is made as to the qualification of the executors, and, as we understand it, the probate did not *ipso facto* involve their appointment or the confirmation of the foreign appointment in this State, so as to enable them to sue here.

The qualification of the executors is a matter entirely separate and distinct from the probate of the will and supplemental thereto. The oath required of executors in Pennsylvania is not identical with that required of them in this State. Section 1882 of the general statutes requires that every executor, at the time of proving the will, shall take the oath there prescribed, "that the writing contains the last will of the deceased so far as

he knows or believes, and that he will well and truly execute the same, by paying first the debts and then the legacies contained in the said will, so far as his goods and chattels will thereunto extend and the law charge him; and that he will make a true and perfect inventory of all such goods and chattels," etc. These plaintiffs never took this oath or received letters testamentary in this State, and as was said in *Reynolds v. Torrance, supra*: "The opinion of the court is, that the authority derived from the probate of a will and letters testamentary in another of the United States, will not extend to this so as to empower the executor to meddle with the effects or credit of the deceased within this State. * * * An authenticated copy of a will and probate coming from another State, may be received in this, as sufficient evidence of such will and probate, but will not authorize the executor, acting by virtue of letters granted in another State, to meddle with property in this State, without first applying for and obtaining letters testamentary in this State, because the ordinaries [judges of probate] within their several precincts, are bound to see to the due application of the assets of persons deceased and ought to have a correcting power over those intrusted with the administration of such assets, for the safety and interest of creditors and others within this State."

It is the judgment of this court that the judgment of the Circuit Court be reversed.

TOEBBE vs. WILLIAMS.

[80 Kentucky, 661.]

WRITING HELD A VALID WILL, ALTHOUGH TESTATOR THOUGHT IT INFORMAL.—PRESUMPTION AS TO WHEN ERASURES WERE MADE.

A testamentary paper written and subscribed by testator with the intention of making it his will, is such, although he may have erroneously thought it void for want of legal formality.

It is a presumption of law that all alterations, interlineations or erasures in a will, were made after its execution.

Breckinridge & Shelby and *Buckner & Allen*, for appellants.

Beck & Thornton, *T. N. Allen*, and *J. H. Mulligan*, for appellees.

HARGIS, C. J. Timothy Daly wrote his will on four pages of paper forming one sheet, and signed his name at the bottom of each page.

Afterwards, he went to an attorney and said: "Here is my will," and asked him to suggest such verbal corrections as he thought advisable.

The attorney read it over, and made four unimportant suggestions in pencil between the lines of the pen and ink writing and in the unoccupied space at the end of lines, there being no blanks in the will.

Besides the pencil suggestions, the attorney ran the pencil across the words "she will want it," but left them plain and easily to be read.

He also told Daly that a will wholly written by the maker did not require any witnesses, but that a will not so written did require witnesses, and gave him a form of attestation, written in pencil, on a scrap of paper which Daly took away with him.

The will was found after his death in a box under his bed.

It was in wrappers on which was written the words "Old will," "Will," "Will and map," "Winchester account," and an old form or unfinished will and the Winchester account were with it in the wrappers.

Following Daly's name, on the last page, is an attestation in form like the one written by the attorney, but not signed by any witness.

The probate of the paper was contested on the ground that it was not a completed will.

Upon a trial of that issue the court rejected all instructions asked by the parties, and instructed the jury as follows:

First. If the jury believe, from the evidence, that the writing in pen and ink, which is presented as the last will

of Timothy Daly, was wholly written by him, and was subscribed by him with the intention of making it his will, and was, according to his *mind* and intention, a completed paper before any of the pencil alterations were made in it, the jury should find the writing propounded to be the last will of Timothy Daly.

Second. Unless it was so written and subscribed by him, with said intention and *understanding*, before said pencil alterations were made, the jury should find that it is not his will.

The third instruction need not be quoted, as it is unobjectionable.

The instructions one and two above mentioned are erroneous, and did not present the correct law of the case to the jury.

If the paper was wholly written and subscribed by Daly, with the intention of making it his will, it was his will, although he may not have thought it was a completed paper, by reason of a mistaken notion on his part that the law required witnesses to such a paper. It was a complete and lawful will when he presented it to the attorney for verbal suggestions.

He did not ask the attorney to *make* the corrections, he only asked him to *suggest* such verbal corrections as he thought advisable, and there is no proof that Daly ever adopted any of the suggestions as a part of his will, hence the paper must be treated as if the suggestions had not been made, if Daly intended the paper, as he had written and signed it, to be his will.

And whether, according to *his mind*, it was a completed paper or not, if he intended it as his will, and had complied with the forms of law by writing and signing it himself before the pencil suggestions were made, it is his will, and it ought to be probated, notwithstanding he sought the verbal suggestions, which he did not adopt, and erroneously believed that the attestation of witness was necessary, or contemplated the possibility of a change of mind, when he might be unable to write

or desire some other person to write a will for him when the attestation form would be important.

The italicized words "*mind*" and "*understanding*," as used in the quoted instructions, were in conflict with the view of the law above expressed, and ought not to have been employed in the instructions as they were.

In the absence of evidence to the contrary, the law presumes that the date of the paper is the date of the subscription, and that all alterations, interlineations, or erasures, which appear upon its face, were made after its execution, and the jury should have been so instructed, because these are presumptions of law, and not mere presumptions of fact or logical deductions in the popular sense.

It is true they are disputable presumptions of law, and admit of evidence to overturn them; but such presumptions should not be confounded with presumptions of fact, and should always be explained to the jury, whose duty it is to give full weight to such presumptions. (Taylor on Evidence, section 97; Greenleaf's Evidence, section 33, *et seq.*)

Evidence of verbal statements made by the testator, after making his will according to the forms of law, to the effect that he has not made a will, do not constitute a revocation and possess but little value, and when permitted to go to the jury they should be instructed that such statements do not tend to prove revocation, and furnish no light in construing the written acts of the testator. (Section 10, chapter 113, General Statutes.)

Wherefore, the judgment is reversed, and cause remanded, with directions to award to the appellants a new trial.

Presumption as to when alterations in will were made.—It is a very ancient rule of the common law that an obvious alteration or interlineation in a *deed* is to be presumed to have been made before the final execution. Co. Litt. 225b. n. (1); Trowal v. Castle, 1 Keble, 22; Doe d. Tatham v. Catamore, 16 Q. B. 745; s. c. 5 Eng. L. & Eq. 849.

But for obvious reasons, growing out of the nature and force of the instrument respectively, a contrary rule has prevailed, both in England and the United States, in regard to *Wills*. Such alterations appearing in

a will are presumed to have been made after the execution. *Doe d. Shallcross v. Palmer*, 16 Q. B. 747; s. c. 6 Eng. Law & Eq. 155; *Cooper v. Brockett*, 4 Moore's P. C. 419; *Burgoyne v. Showler*, 1 Rob. Ecc. 5; *Rosc. N. P.* 160; *In re White*, 30 L. J. Prob. 55; *Gann v. Gregory*, 3 D. M. & G. 777.

A late case in New York contains the same rule. *Wetmore v. Carryl*, 5 Redf. 544.

The burden of proof is upon him who asserts the alteration to be valid to show that it was made before execution, unless that way be fairly inferred from the paper itself. *Goods of Syker*, L. R. 3 P. & D. 26; *Goods of Cadge*, L. R. 1 P. & M. 548; *Van Buren v. Cockburn*, 14 Barb. 118; *Dench v. Dench*, 25 W. R. 414; *Goods of Adamson*, L. R. 3 P. & D. 253; *Rees v. Rees*, L. R. 3 P. & D. 84.

Where erasures in a will are found after the death of a testator, the court will hear evidence to show under what circumstances they were made, and on proof of their having been made after the execution of the instrument may order the original words to be restored. *Sturton v. Whellock*, Eng. High. Ct. Just., Leg. N.

Interlineation of certain words in the declaration of a trust in a will was held to have been made prior to the execution of the will. *In re Cruttenden*; *Davey v. Lansdell*, 45 L. T. (N. S.) 465, 30 W. R. 57 (V. C. H.).

It may be shown that a clause was inserted in a will by another hand, without due authority. *Charles v. Huber*, 78 Penn. St. 448.

And that a certain sheet was not in the will when executed. *Miller v. Travers*, 8 Bing. 244.

If a will be found in the testator's possession and torn, or mutilated, or otherwise altered or defaced, it will be presumed to have been so changed or mutilated by the testator himself, *animo revocandi*. *Dudley v. Wardner*, 41 Vt. 59; *Holland v. Ferris*, 2 Bradf. (N. Y.) 334; *Johnson's Will*, 40 Conn. 587; *Patterson v. Hickey*, 32 Ga. 156; *Legare v. Ashe*, 1 Bay (S. C.), 457; *Beaumont v. Keim*, 50 Mo. 28.

Cancellation is presumptively a revocation. *Wolf v. Bollinger*, 63 Illinois, 368; *Barksdale v. Barksdale*, 12 Leigh, 535; *Hairston v. Hairston*, 30 Miss. 276.

In many instances the court seem to incline to the view of no presumption, requiring in each case the person proposing the instrument to explain all suspicious phenomena. *North River Meadow Co. v. Shrewsbury Church*, 23 N. J. L. 424; *Milliken v. Martin*, 66 Illinois, 13; *Jordan v. Stewart*, 23 Penn. St. 244; *Smith v. U. S.* 2 Wall. 232; *Bailey v. Taylor*, 11 Conn. 534.

It has been said that in Pennsylvania alterations are presumed to have been made *before* execution on a theory of innocence. *Wikoff's Appeal*, 15 Penn. St. 290.

And in New Hampshire *after* the execution upon a theory the opposite of the Pennsylvania one. *Burnham v. Ayer*, 85 N. H. 851.

PEARSON *vs.* CARLTON.

[18 South Carolina, 47.]

POSTHUMOUS CHILD INHERITING FROM FATHER.

A posthumous child is a child "left" by his deceased father, within the statute of distributions, and capable of inheriting from him.

THE opinion states the facts.

Bobo & Carlisle, for appellants.

J. S. R. Thomson and *R. K. Carson*, opposed.

McIVER, J. James Carlton died intestate in March, 1862, and in July, 1862, a bill was filed in the Court of Equity by certain of his heirs, alleging that the personal estate in the hands of the administrator was sufficient for the payment of his debts, and praying for partition of his real estate. The administrator answered, saying that he had assets sufficient for the payment of the debts, and consenting to the partition. To this bill the plaintiff, who was then an infant of tender years, and the only child of a deceased daughter of the intestate, was not made a party. John Carlton, a son of the intestate, who was a party to the bill, died intestate in August, 1862, leaving as his heirs at law, the other parties to the bill and the plaintiff, James T. Pearson, as well as the defendant, Anna Waddill, who also claims to be one of his heirs.

No notice was taken of the death of John Carlton in the proceedings then pending for partition, and on September 6th, 1862, an order for a writ of partition to issue was made. In pursuance of this order, a writ was issued, to which the commissioners made a return, allotting a tract of land to the defend-

ant, Elizabeth Carlton, the widow of the intestate, as her one-third of the real estate, which, exceeding in value her share by the sum of \$23 90, she was directed to pay that amount (to the other heirs, we presume, though it is not stated to whom) for the purpose of equalizing the partition. The remainder of the land was recommended to be sold, and, accordingly, on the same day, to wit, September 6th, 1862, an order for the sale was made, and in pursuance of this order the balance of the land was sold on October 6th, 1862. At this sale the defendant, Fowler, became the purchaser, complied with the terms of sale, took titles, went into possession, and, subsequently, conveyed a portion of the land to his co-defendant, Brockman. Three days after this sale the widow of the intestate gave birth to a child, the defendant, Anna Waddill, who claims as a posthumous child of the intestate, to be one of his heirs, and, as such, entitled to a share of his estate.

These actions were brought by the plaintiff; one for the purpose of obtaining his portion of the tract of land allotted to the widow, and the other for his portion of the land bought by the defendant, Fowler, at the sale for partition, and for rents and profits. The defendant, Anna Waddill, in her answer, sets up a claim for her share in the said lands as one of the heirs of the intestate. The circuit judge held that, so far as the land allotted to the widow was concerned, she could not be disturbed in the possession of it, unless, upon an inquiry which he directed, it should be ascertained that it exceeded in value her share of the estate, in which event, the plaintiff and the defendant, Anna Waddill, would be entitled to their shares of such excess, as well as to their shares of the amount which the widow was directed to pay for the purpose of equalizing the partition. He also held that these parties were entitled to their shares of the land bought by defendant, Fowler, at the sale for partition, and now claimed by him and his co-defendant, Brockman; and that these defendants should account for the rents and profits of so much of the land over and above their share as actually yielded rents and profits, subject to a deduction for improvements made by them. It was also adjudged that the plaintiff and the defendant, Anna Waddill, were also entitled to their

shares of the share of John Carlton, who died pending the proceeding for partition. Finally, it was decreed that the parties herein pay their own costs respectively.

From this judgment the defendants, Fowler, Brockman and Mrs. Carlton, appeal on the following grounds: Because the circuit judge erred—1. In refusing to dismiss the complaint in the case first above stated. 2. In requiring the defendant, Elizabeth Carlton, to pay her own costs. 3. In requiring a re-assessment of the land assigned to said defendant, Elizabeth Carlton, as her distributive share of the real estate of her deceased husband. 4. In holding that the plaintiff and Anna Waddill were entitled to any share in the premises so assigned. 5. In holding that the defendants, J. M. Fowler and Sanford Brockman, should account for the rents and profits of the land purchased by the said Fowler at the partition sale of the real estate of James Carlton, deceased. 6. In holding that the defendant, Anna Waddill, is entitled to any share in the land purchased by the said Fowler as aforesaid. 7. In holding that the defendants, J. M. Fowler, Sanford Brockman and Elizabeth Carlton, were bound to account to the plaintiff and Anna Waddill for the interest of the latter in the share of John Carlton, deceased, in said premises. 8. In holding that the premises described in the complaint were subject to partition.

We propose, first, to consider the claims of the plaintiff. We do not see how it can be questioned that he has a right to have partition of the lands in question. He was confessedly one of the heirs of the intestate, James Carlton, and he was not made a party to the proceedings for partition—was an infant at the time, and has only recently attained the age of twenty-one years. He was, therefore, not bound by those proceedings, and his rights stand as if no such proceedings had ever been instituted; for if there is anything settled, it is that judgments bind only the parties to the proceedings in which they are obtained and their privies. Indeed it does not seem to be seriously denied that he has a right to demand partition of the land purchased by the defendant, Fowler, and to have his share thereof set apart to him.

It is contended, however, that inasmuch as the share of the

widow would have been one-third anyhow, no matter what may have been the number of the children, and inasmuch as only one-third of the real estate was allotted to her, that the plaintiff has no cause of complaint against her, as that amount would have been allotted to her even if the plaintiff had been a party to the proceedings for partition. But it must be remembered that persons interested in the subject-matter of litigation are required to be made parties for the purpose of enabling them to be heard at every step taken therein, and as this plaintiff has not yet had an opportunity of being heard as to the propriety of the partition which has been made, he still has that right. It may be that, through collusion, mistake or negligence of the other parties, the land allotted to the widow exceeded her share, or that the partition was open to objection upon some other ground, and the plaintiff undoubtedly has a right to have the whole matter inquired into; and most unquestionably he has a right to demand from the widow his portion of the amount which she was directed to pay for the purpose of equalizing the partition. This being so, it follows, necessarily, that there was no error in requiring the defendant, Elizabeth Carlton, to pay her own costs; on the contrary, the provision of the circuit decree, in that respect, is perhaps, more favorable to her than she would have had a right to demand.

The next inquiry is, whether there was any error in requiring the defendants, Fowler and Brockman, to account for rents and profits. Although there seems to be some conflict of decision elsewhere as to the liability of one tenant in common to account to his cotenants for rents and profits of the premises held in common, yet, in this State, the rule is too well settled to admit of controversy, that, when one tenant in common occupies and uses more than his share of the common property, he is liable to account to his cotenant for the rents and profits of so much of the common property as he has occupied and used in excess of his share. (*Scaife v. Thomson*, 15 S. O. 338, and the authorities therein cited.) The plaintiff never having been divested of the title to his share in the land bought by Fowler at the sale for partition, was, unquestionably, tenant in com-

mon, and, as such, entitled to an account for rents and profits as directed by the circuit judge.

Next, as to the plaintiff's claim for his portion of the share of his deceased uncle, John Carlton, in the intestate's estate. John Carlton was originally one of the parties of the proceeding for partition, and had he lived until the decree for partition and sale thereunder was made, his interest would undoubtedly have passed to the purchaser at such sale. But, pending that proceeding, and before any decree for partition, he died intestate, leaving the plaintiff, who was not a party to such proceeding, as one of his heirs at law, and no notice whatever was taken of his death in the further conduct of that case. Of course, when John Carlton died intestate, his interest in the real estate of his deceased father at once descended to and became vested in his heirs at law, of whom the plaintiff was one, and any subsequent sale of the estate, under a proceeding to which the plaintiff was not a party, could no more divest the interest of the plaintiff in the share of his deceased uncle than it could divest his interest in the estate of his grandfather. It is clear, therefore, that the plaintiff was entitled to claim, not only his share as one of the heirs of his deceased grandfather, but also his share as one of the heirs of his deceased uncle, John Carlton; and there was no error in the judgment below in this respect.

Finally we are to consider what is the only real question in the case, the claim of the defendant, Anna Waddill, the posthumous child of the intestate. Under a rule which was rigidly observed by some of the former chancellors of this State, this question could never have arisen; for, according to that rule, a bill for partition of the real estate of an intestate would not have been entertained until after the lapse of twelve months from the death of such intestate. If this wholesome rule had been observed when the application was made for the partition of his estate, the parties would probably have been saved the expense of this litigation. But although this was a rule governing the practice of some, at least, of the former chancellors, on circuit, yet it was not based upon any statutory provision like that forbidding the distribution of the personal estate of an

intestate "till after one year be fully expired after the intestate's death" (2 Stat. 524; Gen. Stat. 455), nor did it have the sanction of any decision of a court of last resort, so far as we know. We cannot, therefore, undertake to say that the failure to observe this statutory rule invalidated the partition now under consideration.

The question, therefore, of the right of a posthumous child to inherit from his deceased father, is, so far as we are informed, for the first time distinctly presented for decision in this State. The rule, elsewhere, seems to be well settled, that a posthumous child inherits from his deceased father just as if he had been born in the lifetime of such father, and had survived him. In 4 Kent's Com. 412, it is said: "Posthumous children inherit, in all cases, in like manner as if they were born in the lifetime of the intestate and had survived him. This is the universal rule in this country. It is equally the acknowledged principle in the English law; and for all the beneficial purposes of heirship, a child in *ventre sa mere* is considered as absolutely born." So in 3 Washb. Real Prop. bk. 3, ch. I, § 2, p. 16, it is said: "Posthumous children inherit in the same manner as if they had been born in the lifetime of their father, and were surviving heirs; and this doctrine is universally adopted in the United States. And this relates back to the conception of the child, if it is born alive."

In *Wallis v. Hodson*, 2 Atk. 115, the intestate died in December, 1724, "and, at his death, left issue, Towers Wallis, his only child, an infant, who died within a week after his death, and the defendant, Elizabeth, his widow, *enceinte* with the plaintiff, who was born on May 22d following;" and the question was whether the posthumous child could take any portion of the deceased son's estate. *Held*, that she could, Lord Hardwick saying: "The principal reason I go upon in the question is, that the plaintiff was in *ventre sa mere* at the time of her brother's death, and, consequently, a person *in rerum natura*, so that both by the rules of the common and civil law, she was, to all intents and purposes, a child, as much as if born in the father's lifetime." In *Lancashire v. Lancashire*, 5 T. R. 49, John Lancashire, being unmarried, made his will, and, subse-

quently, married and died, leaving his wife pregnant, who, subsequently, gave birth to a child, and the question was whether this operated as a revocation of the will. The general proposition that marriage and the birth of issue would operate as a revocation being conceded, the only question considered was, "whether a posthumous child is considered in the same situation as one born during the parent's life, and the conclusion reached was that there was no distinction. (See, also, *Thellusson v. Woodford*, 4 Ves. 322.)

An argument in support of a contrary view has been suggested, drawn from the word "leave" in our statute of distributions, and it has been contended that as our statute provides only for those whom the intestate *leaves* at his death, an unborn child of the intestate cannot be said to be one of those *left* by him at his death, and, consequently, cannot inherit under the statute. If, however, as we have seen, there is no distinction, in law, between a posthumous child and one born during the father's lifetime, so far as the right to inherit is concerned, this argument loses its force. But, in addition to this, it has been repeatedly decided that a devise to the children of one "living at his death" embraces a posthumous child. (*Clarke v. Blake*, 2 Ves. Jr. 673, and the cases therein cited; *Jenkins v. Freyer*, 4 Paige, 52; *Steadfast v. Nicoll*, 3 Johns. (N. Y.) Cas. 18.)

So in *Burdet v. Hopegood*, 1 P. Wm. 486, the testator devised the premises, "in case he should leave no son at the time of his death," to the defendant, Hopegood, and died, leaving his wife pregnant, who afterwards gave birth to a son, the plaintiff, and it was held that the plaintiff was entitled to the devised premises, the contingency upon which the estate was to go over to the defendant not having happened; the testator did *leave* a son, although he was not born at the time of his father's death. See, also, *Bedon v. Bcdon*, 2 Bail. 231, where the same view seems to have been taken as a matter of course, the question not being discussed by the court. It seems to us, therefore, that a posthumous child, who is afterwards born alive, must be regarded as one of the children left by his deceased father, and, as such, capable of inheriting under our statute.

It may be contended, however, that though a posthumous child is an heir of his deceased father, and, as such, entitled to a portion of his estate, yet, that, as his rights do not attach until his birth, he must take his portion of the estate in the condition in which it is found at his birth; and where, as in this case, the real estate of his deceased father has, before his birth, been converted into money or bonds by a sale thereof, his claim must be confined to his share of such money or bonds, and that he cannot claim a share of the land in the hands of a purchaser.

We have found one case, which, at first view, seems to support this proposition. (*Knotts v. Stearns*, 91 U. S. 638.) In that case, the action was brought to set aside the sale and conveyance of certain real estate in the city of Richmond, Virginia, of which one Edwin Knotts died seized. The order of sale was obtained under a bill filed for that purpose by the guardian of the infant children of the deceased, to which his widow was a party. The case made by the pleadings and evidence was, that the property sold consisted of a house and lot, which, with a few articles of household and kitchen furniture, constituted the entire estate of the intestate; that the house was much out of repair, so much so that it could not be rented, and the parties had no means to repair it, nor had they any other property from which they could derive a support; and that it was manifestly for the interest of all parties concerned that the property should be converted into funds yielding an income. The property was sold on April 5th, 1863, the money paid and invested in Confederate bonds by order of the court, and titles were made to the purchaser. In the month of May, following the sale, the widow gave birth to a posthumous child, and the sale was attacked because this unborn child was not a party to the proceedings, nor were its interests specifically considered in the proceedings in that case. The court held that "the posthumous child did not possess, until born, any estate in the real property of which his father died seized, which could affect the power of the court to convert the property into a personal fund, if the interests of the children then in being or the enjoyment of the dower right of the widow required such conver-

sion. Whatever estate devolved upon him at his birth was an estate in the property in its then condition. That property had then ceased to be realty; it had become, by the sale, converted into personalty." The court also relied upon the further ground that, under the laws of Virginia, "Parties in being, possessing an estate of inheritance, are there regarded as so far representing all persons, who being afterwards born, may have interests in the same, that a decree binding them will also bind the after-born parties," and refers to the case of *Faulkner v. Davis*, 18 Gratt. 651; and this case, upon examination, will be found to be not in conflict with the views herein presented. No other authority is cited, and the conclusion reached by the court, upon this branch of the case, is not supported by any reasoning further than that above quoted.

This case, it will be observed, was not a case in which an order of sale for partition was in question, but, on the contrary, was a case in which the order of sale which was attacked, was made by the court for the purpose of changing an unfruitful investment of the property of persons who were not *sui juris*, into something that would yield an income necessary for the support of such persons. The sale, therefore, might, perhaps, have been sustained upon the principles established by the case of *Bofil v. Fisher*, 3 Rich. Eq. 1, in which the court of equity asserted its power to bar, by its decree for sale, the interest of unborn contingent remaindermen, who, of course, could not be made parties. But such a power could only be exercised when a proper case was made for its exercise—when, as in the case of *Knotts v. Stearns*, and in *Bofil v. Fisher*, it has been ascertained, by an inquiry made for that purpose, that a sale was necessary to provide for the interests of those who could be, and were, brought before the court. A proceeding for partition is a very different matter, and presents totally different questions for the consideration of the court; and if, as we have seen, the doctrine is well settled that a posthumous child inherits in the same manner as if he had been born in the lifetime of his father and had survived him, we do not see how his interest could be divested by a proceeding for partition to which he was not a party, notwithstanding the inference that may be drawn from

some of the remarks made in the case of *Knotts v. Stearns, supra*.

We think, therefore, that the defendant, Anna Waddill, was entitled to claim the same rights as the plaintiffs has been shown to be entitled to, and that there was no error on the part of the circuit judge in so adjudging.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

McGOWAN, J., absent at the hearing.

WHITE vs. SPAULDING.

[50 Michigan, 22.]

REMOVAL OF ANCILLARY ADMINISTRATOR.—INTEREST OF WIDOW.

—NOTICE TO ADMINISTRATOR.—NON-RESIDENCE.

An intestate's widow has no interest in petitioning for the removal of an ancillary administrator who is administrator at the place of deceased's domicile, where she resides.

A mere allegation that a petitioner for the removal of administrator is a creditor of deceased, is not enough without a *prima facie* showing of how he became such.

A petition of removal "for non-performance of his duty," is not sufficiently specific to put the administrator on his defense.

Notice of proceedings to remove an administrator living in a foreign jurisdiction, must be served personally on him and on the heir at law.

Non-residence is not of itself a sufficient ground to remove an ancillary administrator who is also administrator at deceased's place of domicile.

PROCEEDINGS to remove an administrator.

J. B. Clayberg, for petitioners.

J. D. Turnbull and *J. C. Shields*, for respondent.

COOLEY, J. This case comes before us on *certiorari* to review proceedings which have been had in the Probate Court for the county of Alpena, and afterwards in the Circuit Court

on appeal, to remove the respondent from the office of administrator of the estate of William White, deceased, and which resulted in an order for his removal.

Without going into the evidence in the case, which is set out in full in the record, it will be sufficient for our purposes to state the facts as they appeared of record in the Probate Court at the time the administrator was called upon to make answer to the charges against him.

William White, it appears, was a resident of the State of Massachusetts, and died in that State in 1873. He left surviving him Eliza White, his widow, and a daughter, his sole heir at law, both of whom then resided and still reside in Massachusetts. The respondent, very soon after the death of William White, was appointed administrator in the State of Massachusetts, and on the supposition that there was property belonging to the estate in the county of Alpena, letters of administration were taken out by the respondent in that county also. That administration was of course ancillary to the administration in Massachusetts. If there was any such property, no inventory was ever made of it and filed in the Probate Court. The reasons for this we could only obtain from the evidence, and into that we do not go; merely stating the fact that up to the time when the petition for removal was filed there was nothing of record to show that the ancillary administration had anything on which to act. A warrant had been issued to commissioners for proving claims, and the commissioners had made their report showing that none were proved, but the record did not show any order for the warrant. Neither did it show any application by creditors to prove claims in any way, or any orders by the Probate Court to expedite the proceedings of the administrator.

Such was the position of things when, on July 19, 1880, the following petition was presented in the Probate Court:

“STATE OF MICHIGAN, COUNTY OF ALPENA—ss.

“In the matter of the estate of William White, deceased.

“To the Hon. J. D. Holmes, Judge of Probate for the county of Alpena, in the State of Michigan.

“We, the undersigned, Eliza White, widow of the late Wm.

White, of Boston, Massachusetts, and D. H. Rogers, of Boston, and Geo. N. Fletcher, of Detroit, principal creditors of the said White, deceased, ask that you will remove Rufus H. Spaulding, of Boston, who was appointed administrator of the estate of said White, in 1873, by Obed Smith, Judge of Probate, for non-performance of his duty, and such other reasons as will be presented to you on the hearing thereof, and to appoint, in his place, some other suitable person resident of the State of Michigan.

“ELIZA WHITE,

“D. H. ROGERS,

“GEO. N. FLETCHER.”

This petition was verified in general terms by Fletcher, and the judge of probate made an order for hearing upon it on August 14th following. The order directed that notice be given to all persons concerned by three weeks publication in an Alpena newspaper.

As this petition was the beginning of the present proceeding, it becomes important to know whether it was sufficient to invoke the jurisdiction of the court for the object at which it aimed. To render it sufficient for the purpose two things were essential: *first*, that it should be presented by parties interested in the proposed order; and *second*, that it should allege sufficient cause. Mere intruders have no business to interfere in the management of estates, and are not concerned with the shortcomings of those to whom their administration has been committed. (*Dowdy v. Graham*, 42 Miss. 451; *Carroll v. Huie*, 21 La. Ann. 561.)

The petitioners in this case represent themselves as being the widow and principal creditors. No question is made respecting the fact of Mrs. White being the widow, but it is denied that, as such, she had any apparent interest. If the intestate at the time of his death had been domiciled in this State, so that his personalty must be distributed according to our laws, and the widow under the statute of distributions would have been interested in the property, no doubt could have arisen respecting her interest in the expediting of administration.

Pace v. Oppenheim, 12 Ind. 533; *Evans v. Buchanan*, 15

Ind. 438.) But in this case the intestate was domiciled at the time of his death in Massachusetts; his widow, if entitled to personalty, will obtain it there and according to the laws of that State, and the wrong, if any is being done to her, is done there and by the respondent in his capacity of principal administrator, and not here in this mere ancillary proceeding. The impropriety of the widow coming to Michigan from Massachusetts, where she has her home, to complain of the administrator who also resides in Massachusetts, where her right to claim anything from him in his representative capacity is a right given and measured by and enforceable under the laws of Massachusetts and in its courts, seem too obvious to be enlarged upon. And it is presumed that parties having substantial grievances do not often go several hundred miles to a foreign jurisdiction for a justice which can be more properly as well as more completely awarded to them in the forum of their domicil.

It is true that if real estate shall be discovered, belonging to the estate in Michigan, the widow will be entitled to dower in it, but it is also true that she makes no allegation that there is such estate, and if there were any, she is under no necessity of awaiting the proceedings of the administrator to have dower assigned to her in it. His proceedings do not necessarily delay her in any way.

We need not remark upon the fact, which will probably not be contested, that there is a manifest propriety in having the principal and the ancillary administrations in the same hands, or at least not in hostile hands, and that if there is any substantial reason why this administrator should be removed, the Massachusetts court is *prima facie* the one to be appealed to. But for the purposes of this case it is sufficient for us to say that the widow shows or indicates no interest of her own to be subverted by the proposed order, or which is prejudiced by the action of the administrator.

The other petitioners claim to be principal creditors. The fact that they are such is left to stand upon their naked assertion without specification or explanation. What are their claims, and when did they accrue? Neither the record nor the

petition gives us any light on that subject. Under some systems of probate proceedings, differing from ours, and where the claims are not proved in the Probate Court, very slight showing of indebtedness to the petitioner would no doubt be sufficient, because it would not be expected that on the hearing of such a petition there should be a trial on disputed collateral facts; but under no system would a naked allegation that one was a creditor, without showing how or by what instrument or contract he became such, be sufficient. There should be at least a *prima facie* showing in any case. (*Gratacap v. Phyfe*, 1 Barb. Ch. 485; *Cotterell v. Brock*, 1 Redf. Sur. 148; *Colegrove v. Horton*, 11 Paige, 261.) But under the system which prevails in this State all claims are proved and allowed either in the Probate Court itself or before commissioners appointed by, and who report to, the probate judge; so that the records of the Probate Court show, after the proper time has elapsed, whether there are any creditors or not, and if there are any, who they are. In the early stages of an administration this might not be so, but after the lapse of several years it is presumptively so always.

In this case not only do Fletcher and Rogers fail to show that they have any claim, but the *prima facie* case is against them. If the proceedings of the commissioners who were appointed to pass upon claims were valid, it is plain that these parties are not creditors. But we do not at this time enter upon the question of the validity of the proceedings of the commissioners, because, independent of that, these parties apparently have no claims. Their claims, if any, could only have arisen in the lifetime of the intestate: he died and letters were taken out upon his estate more than seven years before this petition was presented, and it is this petition that for the first time, so far as the court was informed, notified the administrator that these parties claimed to be creditors. The same paper that first asserted their claims as creditors, demanded the removal of the administrator for neglect of duty towards them in that character. This was simply preposterous. That presumptively they had no claim is sufficiently shown by *Estate of Godfrey*, 4 Mich. 308; *Sperry v. Moore's*

Estate, 42 Mich. 353; *Brown v. Forsche*, 43 Mich. 492. It is immaterial in this case whether or not exceptional circumstances existed which would make them creditors; the courts can only consider such circumstances when they are brought to their notice in some proper way.

This petition then was fatally defective in the first requisite of showing an interest in the petitioners. It was equally defective in its statement of the ground of complaint. The vague allegation of neglect of duty was not sufficient to put the administrator upon his defense, and he might have disregarded it altogether. The judge of probate should have refused to make any order for hearing upon it.

The judge of probate not only made an order for hearing, but, as has been said, he directed constructive service to be made by publication in an Alpena paper. As the parties to be notified, the administrator and the heir at law, both resided in Massachusetts and their residence was known, the judge should not have contented himself with directing a publication of which they might never hear, but should have directed personal service also. He was probably right in assuming that the statute did not require this; but these proceedings are supposed to have substantial justice in view, and the judge of probate should never overlook that fact.

Notice of the proceeding seems to have reached the administrator, and he appeared on the day assigned for hearing, but only for the purpose of moving to quash. Thereupon the petitioners, by an attorney who answered for them, asked and obtained leave to amend. An amended petition was then filed, which appears to have been signed by Fletcher and Rogers, and to which Fletcher also put the name of Mrs. White. This petition is as follows:

“STATE OF MICHIGAN, }
County of Alpena, } ss.

“Probate Court for Alpena County.

“To the Hon. J. D. Holmes, Judge of Probate for said County:

“In the matter of the estate of William White, deceased.

“ Your petitioners would respectfully represent to this court, that they are interested in said estate, as creditors of said William White, deceased; that on or about the 15th day of August, 1873, one Rufus H. Spaulding, of Boston, Massachusetts, was appointed administrator of said estate, by the Probate Court of Alpena county, and still assumes to be administrator of said estate.

“ Your petitioners further show, that on or about the 19th day of July, 1880, they filed their petition in this court, for the removal of said administrator, and that an order to show cause was duly made by this court, upon such petition, as will more fully appear, reference being had to the records, files and orders of this court therein.

“ Your petitioners further represent, that they are informed that their said petition is informal, and make this as their amended petition, to cure any informality and defects in said petition contained.

“ Your petitioners further represent, that said Rufus H. Spaulding is a non-resident of this State, and that he resides in the State of Massachusetts, and should be removed from his office as such administrator, for the following reasons :

“ *First.* That said Rufus H. Spaulding, as such administrator, has neglected and refused to perform the orders and decrees of this court in settling said estate.

“ *Second.* That said administrator has refused and neglected to comply with the requirements of law and the orders of this court, in not filing the requisite bond, in accordance with the laws of this State.

“ *Third.* That said administrator has neglected and refused to render any account of his doings in reference to said estate.

“ *Fourth.* Said administrator has taken no steps to close up said estate, although the time limited by law for that purpose has long since expired.

“ *Fifth.* That said administrator resides out of the State and is a resident of the State of Massachusetts.

“ *Sixth.* That said administrator has neglected, for six years, to administer said estate, and has continually during said time

disregarded the interests of creditors of said estate and the persons interested therein.

"Your petitioners further represent, upon information and belief, that there are lands, or interests in lands, belonging to said estate, or assume so to, located in the county of Alpena.

"Your petitioners therefore pray that the said administrator be removed from his said office, and that the day fixed for the hearing of their petition, heretofore filed, may be considered and treated as the day fixed for hearing this, their amended petition, or that this court may fix such other day for the hearing thereof as may seem just, and that the said administrator may be required to render, forthwith, an account of his administration of said estate, and that such further and other orders and other proceedings may be had in the premises as required by law.

"ELIZA WHITE, G. N. F.

"D. H. ROGERS,

"GEO. N. FLETCHER."

On receiving this petition the judge ordered the hearing to stand over to the fourth day of September, when the case was proceeded with and an order of removal made.

No notice of this amended petition to the heir at law was ordered or was given. If the first petition was fatally defective, as we have found it to be, proceedings on the amended petition should have been taken precisely as if that were the beginning. If the amended petition was sufficient, it was the first paper to set the court in motion, and the heir at law, as a party chiefly concerned, was required to have notice of it. A void proceeding could not be adjourned into validity. The proceeding therefore failed at this stage for want of notice to a necessary party. The heir at law might have waived the defect of notice, but as she did not appear she never did so.

But the second petition was nearly as defective as the first. Fletcher and Rogers again fail to show that they are creditors, and Mrs. White equally fails to show her interest. Besides, she does not sign this petition, and Fletcher does not show he had authority to sign it for her, or even assert such authority.

If, therefore, it might otherwise be sufficient, as to her it would be defective in not appearing to be made by her. The causes assigned for removal with one exception are still vague. There is an allegation of neglect and refusal to perform the orders and decrees of the court, but none are mentioned. Delay is complained of, but there is no pretense of any steps taken by any person concerned or by the court to expedite the proceedings. One ground for removal, however, is distinctly asserted, namely, that the administrator is a non-resident of the State. There is no doubt that a court upon that ground would have the power of removal.

But while we say the court upon that ground would have power of removal, we must also add that in case of a mere ancillary administration, when the ancillary is also principal administrator, it would be very improper to exercise the power without some further reason than the non-residence. There should at least be some showing that the non-residence operated prejudicially. But it is needless to discuss this upon proceedings so defective as these.

It is also needless to enter upon an examination of the facts set out in the answer, or to discuss the evidence. When parties establish for themselves no standing in court, we cannot be required to investigate and pass opinions upon their controversies. This whole proceeding had no legal foundation whatever and should never have been permitted to occupy the attention of the probate and circuit courts. It must be quashed now, with costs of all the courts against the petitioners.

GRAVES, C. J. and MARSTON, J., concurred.

CAMPBELL, J. I concur in the result on the ground that the first petition, on which alone there was a valid publication, gave no jurisdiction. Upon other matters I express no opinion.

DENTON vs. CLARK.

[36 New Jersey Eq. 534.]

IN OPERATIVE CLAUSES AS GUIDES IN CONSTRUCTION.—POWER OF SALE TO SEVERAL EXECUTORS.—EXECUTION BY SURVIVORS.

Legacies with the amounts blank cannot be resorted to as exponents of a testamentary purpose.

Where a power of sale is given to executors in their official capacity, and not by their names; upon the removal from office of one, the remaining executors can exercise it.

ON APPEAL from the Chancellor.

Bill for specific performances.

Complainant was executrix and William A. Lewis executor of the will of H. F. Clark. Complainant upon her own petition was discharged from the office of executrix. Thereafter she purchased the land in question, being part of testator's residuary estate, upon a sale by the executor. The will contained several legacies with the amounts in blank. It also contained the following provisions:

"*Item.* All the rest and residue of my houses and lands and real estate remaining and not hereinbefore particularly devised, whatsoever and wheresoever situate and being, I hereby *authorize, empower and direct* my said executrix and executors, the survivors and survivor of them, *within one year after my decease, or within such further time as they may deem advantageous and to the best interest of my estate,* to bargain and sell, either at public or private sale, as they may deem best, to any person or persons, and for such price and prices, and on such terms as they may think proper, hereby authorizing them to receive in part payment at such sale or sales part consideration mortgages on such liberal terms as they may deem prudent and advantageous to my estate; and for all the said houses and lands and real estate so to be sold, when sold as aforesaid, I hereby empower my said executrix and executors, the survivors and survivor of them, to make, execute

and give to the purchasers thereof respectively, good and sufficient deeds in the law for the transfer thereof.

“*Item.* The rents arising from any houses and lands and real estate which I have directed to be sold, from the time of my decease to the time of such sale and conveyance, after paying thereout all taxes, assessments, repairs and interest on mortgage incumbrances, if any, as the same may be chargeable from time to time, I instruct and direct my *executrix and executors, the survivors and survivor of them, to pay over in quarterly installments, and in the following proportion, as bequests which I give to the following persons, to wit:*

“To my beloved wife, Lydia Ann Clark, an equal one-sixth part thereof; to my daughter, Mary Fannie Brown (wife of Archibald K. Brown), an equal one-sixth part thereof; *to my son-in-law, the said Archibald K. Brown, an equal one-sixth part thereof; to my daughter, Anna Elizabeth Pearsall (wife of William Pearsall), an equal one-sixth part thereof; to my son-in-law, the said William Pearsall, an equal one-sixth part thereof;* and the remaining one-sixth part thereof I reserve to be applied to the education of my grandchildren, and direct my trustees hereinafter named to pay, from time to time from the fund created from this said remaining one-sixth, in such sums as may be required, on account of the suitable education of my said grandchildren, and for their education, or the education of any or either of such grandchild or children whom my said wife and my said daughters may agree and determine to educate.”

A. Q. Garretson, for appellant.

Collins & Corbin, for respondent.

BEASLEY, C. J. The first justification attempted by the appellant of his refusal to complete his contract to purchase the lands in controversy, is that the testamentary power, given to the executors by the will in question, had failed when the sale was made, because the purpose for which it had been given did not arise. It is an unquestionable rule of law, that in cases in which an authority of this kind is created with an intent to

effect a certain end, and the condition of affairs becomes so changed that such end cannot be attained, or is reached without a resort to such power, that the right to exercise such power, *ipso facto*, ceases. This was the substantial ground of decision in *Moore v. Moore*, 12 Vr. 440, and in *Brearley v. Brearley*, 1 Stock. 21. The reason of the rule is that the testator meant to have the land converted into money for a certain purpose only, and such purpose failing, he did not intend it to be converted. In the application of this rule to the present case the appellant contends that the power to sell these lands was given to the executors, to subserve the purpose of raising funds to pay the amounts which the testator intended to insert in the legacies which were left in blank in that respect. But this position is both illogical and without any legal basis to be rested on. It is illogical because it attributes to the testator the creation of a power to convert his lands into money, in furtherance of a purpose which had been abandoned by him at the time he executed his will; and it is destitute of all legal foundation, because clauses in a will which are so incomplete as to be inoperative, are not admissible as exponents of a testamentary purpose. The question always is, what the testator meant when he put his will in force by the act of executing it; and when knowingly, at that period, he permits clauses to be so incomplete as to be nugatory, such clauses are no part of the testamentary plan, and consequently can reflect no light upon such plan. To allege, therefore, that the power of sale in this will had no other intent than to effect a purpose that had been entirely surrendered, is, in effect, to allege that it was left in this instrument by the mistake of the testator. Such a contention is not tenable.

Discarding, then, the inchoate elements just mentioned, and turning to the will in its operative parts, the intention of the testator, in the respect in question, is not involved in the least degree of uncertainty. It is plain that the testator's intent was, by the conversion of his lands into money, to make a convenient and equal distribution of it among the beneficiaries named by him in his will. Such a purpose is legibly written in the clause creating the authority in the executors to convert the

lands, which is a general empowerment and direction to them to sell within a year after his decease, or within such further time as they may deem advantageous; as well as in the auxiliary clause, which distributes the net rents of such lands, from the time of his "decease to the time of such sale," among his wife, two daughters, his two sons-in-law, and the remaining sixth to be applied to the education of his grandchildren. Now it is obvious that if this direction ever could go into effect, it would continue during the lives of these several devisees, unless a sale should have been made by the executors. That the testator did not design these rents to be distributed for any great length of time is perfectly manifest from the circumstance of the direction to put an end to that state of things by a sale within the period of a year from his demise, unless such sale should appear injudicious. It is impossible to carry into effect the evident scheme of this will without putting the duty upon the executors to dispose of this land and convert it into money as soon as was reasonably practicable. I conclude, therefore, that the power to make the sale was conferred upon the executors by this testament; the remaining question is, whether it was well executed.

The objection to the sale, raised from the mode in which it has been executed, is that the testamentary power is conferred on the two executors and the survivor of them, and not on a single executor, who is not a survivor. The executrix was formally removed from her office, but this, it is said, does not make the remaining executor, in the legal sense, the survivor of the two. Without stopping to consider or discuss this latter assumption, it is sufficient to say that the subject has recently received a careful treatment by the Supreme Court of this State, in the case of *Weimar v. Fath*, reported in 14 Vr. 1. The doctrine there maintained is that when a will gives executors in their official capacity, a power to sell, without naming the individuals who are to be clothed with such capacity, and to which class the present case belongs, and one of such executors is removed from the office, the power to sell survives, and can be legally executed by the remaining executor. The principle thus promulged is deduced as well from the common law

as from the statutory law of this State, and it would be useless to repeat on this occasion the reasoning, or recite the authorities, which conduced to the result just stated. There was no fault in the mode in which the testamentary power was exercised in the present instance, and the decree appealed from should, consequently, be affirmed.

Decree unanimously affirmed.

THAYER vs. FINNEGAN.

[184 Mass. 62.]

LEGACY A CHARGE ON LAND DEVISED.—LEGATEE JOINING IN MORTGAGE WITH DEVISEE.

A gift by a mother to her eldest son of all her real and personal property, he to pay her debts and the school expenses of a younger son, the personalty amounting to \$20 and the real estate to \$1,500, makes the provision in favor of the younger son a charge on the realty.

If a legatee of a legacy charged on land devised joins in a mortgage thereof with the devisee who is also executor, he loses, upon a foreclosure of the mortgage, his claim upon the land and all right of action for his legacy against sureties on the executor's bond.

ACTION against a surety upon a bond given by Thomas C. Coleman, as executor of Mary Coleman.

The deceased by her will appointed her son, Thomas C. Coleman, executor, and continued, "I give and bequeath to said Thomas Coleman all my real and personal property of which I shall die seized and possessed, to him and his heirs forever, said Thomas C. to pay all the debts then outstanding at my decease, and also to pay the school expenses of my son John F. Coleman until through college, provided said John continues to the end of the proposed collegiate course, and so long as he continues at college."

The testatrix left personalty worth \$20 and real estate valued at \$1,500.

This action was brought for the benefit of John F. Coleman for the excess of his school expenses over the sum of \$365 paid therefor by the executor.

Thomas C. Coleman mortgaged the real estate devised for \$500, then for \$200, and finally for \$100, to secure personal debts. In the last mortgage John F. Coleman, being of full age and ignorant of the prior mortgages, joined. Subsequently the property was sold under the power in the mortgage and purchased by the mortgagee.

H. C. Hartwell and *J. C. McMahon*, for plaintiff.

G. A. Torrey, for defendant.

C. ALLEN, J. The question whether the legacy to John F. Coleman, of the expenses of his education, was a charge upon the real estate, depends upon the intention of the testatrix, as gathered from an examination of the whole of her will, in view of the existing circumstances. Particular facts have often been declared to be especially significant, as indicating such intention, and sometimes, indeed, a rule has been laid down in terms apparently absolute. Thus it is said in *Hawkins on Wills*, 294, that "if legacies are given generally, and the residue of the real and personal estate is afterwards given in one mass, the legacies are a charge on the residuary real as well as the personal estate." This rule is founded on the decisions in *Greville v. Browne*, 7 H. L. Cas. 689, 696, 697; *Francis v. Clemow*, Kay, 435; *Harris v. Watkins*, Kay, 438; *Wheeler v. Howell*, 3 Kay & Johns. 198, 203; *Cole v. Turner*, 4 Russ. 376; and earlier English cases. It is adopted in terms in *Corwine v. Corwine*, 9 C. E. Green, 579; and it also finds more or less confirmation in other American cases. (See *Lewis v. Darling*, 16 How. 1, 10; *Adams v. Brackett*, 5 Met. 280; *Downman v. Rust*, 6 Rand. 587, 591; *Davis's Appeal*, 83 Penn. St. 348, 353; 2 Perry on Trusts, § 570.)

So, where the devisee of real estate is appointed executor, and is expressly directed to pay legacies, it has been considered as sufficient to show an intention that the land should be charged. (*Preston v. Preston*, 2 Jur. [N. S.] 1040; *Dover v.*

Gregory, 10 Sim. 393; *Henwell v. Whitaker*, 3 Russ. 343; 2 Jarm. Wills [5th Am. ed. by Bigelow], 595, 596, and cases cited.) This also has been considered as a significant indication of such intention in this country. (*Van Winkle v. Houten*, 2 Green's Ch. 172, 191; 2 Perry on Trusts, § 570.)

So, where the devisee of real estate, though not appointed executor, is positively directed to pay legacies, especially if such direction is contained in the same sentence with the devise, or appears to be given in consideration thereof, it has been held sufficient to create a charge on the real estate. (*Sands v. Champlin*, 1 Story, 376; *Merrill v. Bickford*, 65 Maine, 118; *Luckett v. White*, 10 Gill & J. 480; *Bank v. Donaldson*, 6 Penn. St. 179; *Harris v. Fly*, 7 Paige, 421.) If no other provision is made in the will for the payment of the legacies, this is considered to add to the strength of the presumption. (*Bevan v. Cooper*, 72 N. Y. 317.) Significance has also been attached to the fact that there was no personal property which the testator could have thought sufficient for their payment; though it may be open to question how far this consideration ought to be taken into account. (*Paxson v. Potts*, 2 Green's Ch. 313, 321; *Wallace v. Wallace*, 3 Foster, 149, 156.) So, also, where all the personal property is otherwise disposed of. (*Bevan v. Cooper*, *ubi supra*.)

The fact that the legacies are given to the testator's wife or children has been thought entitled to much consideration. (*Van Winkle v. Houten*, *Bevan v. Cooper*, *ubi supra*.) And in *Sands v. Champlin*, Mr. Justice Story lays peculiar stress on the circumstance that the testator was making a provision for his widow, to be furnished annually. "His intention," he says, "was to have a fund for the security of the payment *durante viduitate*, which can only be by construing the will as making the legacies a charge on the estate." (1 Story, 383, 386; see also *Leavitt v. Wooster*, 14 N. H. 550, 562; 2 Jarm. Wills [5th Am. ed.], 582, and Bigelow's note.)

In considering cases arising in other jurisdictions, the different systems which may there prevail in respect to the statutory liability of real estate for the payment of debts and legacies must not be overlooked; and language which is merely declara-

tory of the doctrine that real estate generally will, from certain phraseology, be held subject to the payment of legacies, in such sense that it will be the duty of the executor to obtain leave to sell real estate for that purpose, may not have direct application to the question now before us. But, looking at the present case with a view to ascertain the probable intention of the testatrix, we find that the legatee was her son. He was at school and preparing to enter college. The legacy was for the purpose of paying the expenses of his education until he should be through college, and was of course to be paid from time to time, extending over a period probably of some years. The devisee was appointed executor, and to him the whole property, both real and personal, was given. The direction to pay the expenses of John's education was contained in the same sentence with the devise of the property, and in such close connection as to show that the devise was intended to furnish the means of paying them. There was, indeed, no other source from which the means of paying the legacy could come. The testatrix was apparently as anxious to provide for the younger son as for the older. These considerations have brought a majority of the court to the conclusion that she must be deemed to have intended to subject the property which she left, real as well as personal, to the payment of the expenses of John's education, and that the devise to Thomas was on an implied trust for that purpose, just as if it had been given to him "on condition," or "in consideration," or "provided," that he should bear such expenses, or "it being understood" that he should do so.

The charge upon the land, in the absence of anything to lead to a contrary result, would bind all who claim under the devisee till payment of the legacy.

The legatee might also have a remedy upon the executor's bond at his election. (*Sheldon v. Purple*, 15 Pick. 528.) But, in case of his enforcing this remedy, inasmuch as the land is primarily charged by the testatrix herself, the sureties would be subrogated to the right of the legatee to proceed against the land. (See *Johnson v. Bartlett*, 17 Pick. 477; *Atwood v. Vincent*, 17 Conn. 575; and cases cited in *Sheldon* on Subrogation, §§ 89, 90, 131.) If, therefore, the legatee, by his voluntary act,

discharges the land from the lien, this would have the effect to cut off the sureties from proceeding against the land, because they can get no greater rights by subrogation than he had to whose rights they are subrogated.

In the present case the legatee joined in a mortgage of the land charged with the payment of his legacy, and thereby conveyed to the mortgagee all his right in the land,—his right to enforce his legacy against the prior mortgagee, as well as his right to enforce it against the holder of the equity of redemption. After the foreclosure and sale, under the power of sale contained in this mortgage, the whole right of the legatee to proceed against the land was gone, even as against those mortgages in which he did not join. At most he had only an equitable right in the land; and, by joining in the mortgage he transferred his whole equitable right to the mortgagee. It follows, therefore, that the defendant, if he were to pay to the legatee the unpaid balance of the legacy, would be unable to proceed against the land for his reimbursement, by reason of the legatee's having joined in this mortgage; and, being deprived by the voluntary act of the legatee of this remedy over, he ought not to be held to make the payment. (*Guild v. Butler*, 127 Mass. 386; and numerous cases collected in Sheldon on Subrogation, § 86.)

Judgment for the defendant.

BOSTICK vs. BLADES.

[59 Maryland, 231.]

CONDITION IN RESTRAINT OF HUSBAND'S SECOND MARRIAGE.

A devise by a wife of real estate to her husband for life "if he shall not marry," and upon his marriage, to her brother in fee, creates a valid devise over.

APPEAL from Talbot county Circuit Court. Action of ejectment. Judgment and verdict in the court below for plaintiff.

I. C. W. Powell and *William R. Martin*, for appellant.

J. F. Bateman and *Philip F. Thomas*, for appellee.

ALVEY, J. This was an action of ejectment, and the case was tried and determined by the court below on an agreed statement of facts.

There is no question made in this court, as we understand, as to the nature and extent of the estate taken by Mary Jane Blades, under the will of her mother, nor as to her power to devise the estate so acquired by her. Indeed, it would be difficult to perceive how such question could be made, as by the terms of the will of the mother, the daughter took by clear and unambiguous language, a fee simple estate in the land in controversy. The mother died in 1863, and some few months thereafter her will was duly admitted to probate. In 1872, Mary Jane Blades, the daughter and devisee, married the defendant, William H. Bostick, and died in 1876. She made and left unrevoked a will executed in due form to pass real estate, and which was duly admitted to probate. That will contains the following clause:—

“I give, devise and bequeath unto my husband, the said William H. Bostick, all my worldly estate, real, personal, and mixed, subject to the payment of my said debts, funeral expenses and legacies, to have and to hold to him for and during the term or period after my death, that he shall remain unmarried; and if he shall not marry, then for and during the term of his natural life, but in the event of the marriage of my said husband, after my death, or if he shall not marry, then, upon his death, I give, devise, and bequeath all of my said estate, to my brother, Stansbury Blades, his heirs and assigns for ever.”

The husband, the defendant in this action, has remained in possession of the real estate devised by the will of the wife up to the present time; but in the year 1880, he married again, and thereupon this action was brought by Stansbury Blades, the brother, and devisee over, to eject the defendant.

In such state of case, the question is, as presented by the

agreed statement of facts, whether or not the plaintiff is entitled to recover, under the terms and conditions of the devise by the wife,—the husband, the first devisee, having married a second time?

It would seem to be well settled by a great number of adjudications both in England and in this country, that conditions in *general* restraint of marriage, whether of man or woman, as a general rule, are regarded in law as being against public policy, and therefore void. But this rule has never been considered as extending to *special* restraints, such as against marriage with a particular person, or before attaining a certain reasonable age, or without consent. Nor has it ever been extended to the case of a second marriage of a woman; but in all such cases the special restraint by condition has been allowed to take effect, and the devise over held good, on breach of the condition. A condition, therefore, that a widow shall not marry, is, by all the authorities, held not to be unlawful. (*Scott v. Tyler*, 2 Dick, 712; *Jordan v. Holkham*, Amb. 209; *Barton v. Barten*, 2 Vern. 308; 2 *Pow. on Dev.* 283; *O'Neale v. Ward*, 3 H. & McH. 93; *Binnerman v. Weaver*, 8 Md. 517; *Gough and Wife v. Manning*, 26 Md. 347; *Clark v. Tennison*, 33 Md. 85.)

In the cases a distinction is taken between those where the restraint is made to operate as a condition precedent, and those where it is expressed to take effect as a condition subsequent; and the decisions have generally been made to turn upon the question, whether there be a gift or devise over or not. But if the gift or devise be to a person *until* he or she shall marry, and upon such marriage then over, this is a good limitation, as distinguished from condition; as in such case there is nothing to carry the interest beyond the marriage. There can be no doubt, therefore, that marriage may be made the ground of a limitation ceasing or commencing; and this whether the devisee be man or woman, or other than husband or wife. (*Morley v. Rennoldson*, 2 Hare, 570; *Webb v. Grace*, 2 Phill. 701; *Arthur v. Cole*, 56 Md. 100.)

In this case, if the devise to the husband had depended alone upon the terms of the first part of the devise, that is to say,

the terms "to have and to hold to him for and during the term or period after my death that he shall remain unmarried," there could be no doubt it would have been a good limitation, and the estate devised to him would have terminated upon his second marriage. But we must read the whole clause together, and take one part in connection with the other, and so reading the terms of the devise, the terms that follow those just recited clearly put the devise in the form of a condition subsequent. The estate is given to the husband for life, but in the event of his second marriage it is devised over to the brother of the testatrix; or, in other words, the devise is to the husband for life, subject to a defeasance in the event of a second marriage. By the terms of this devise a vested estate passed to the husband for a definite duration, but by the happening of the event that was contemplated as possible, the estate, according to the contention of the plaintiff, became divested and passed over to the plaintiff.

Now, there being no question of the power of a husband to effectually impose such a condition in restraint of a second marriage of his widow, the question here is, whether a wife by a devise or gift to her husband can effectually impose a like condition in restraint of his second marriage?

Upon this precise question the books furnish but little direct authority. In our own reports the nearest case to the present is that of *Waters v. Tazewell*, 9 Md. 291. In that case a deed of leasehold property in trust for the sole and separate use of a *feme covert*, contained a provision that in case the husband should survive the wife, he and his assigns should have the rents and profits "during his natural life only, to and for his own use and benefit; *provided*, he should continue *unmarried* after the death of his wife, then living, and from and immediately *after his decease*," then over. This proviso was held void; but it was because, as stated by the court, that the gift over was not upon the marriage of the husband, but "from and immediately after his decease." As the court said, it was not, in terms, a gift over, based upon the event of a second marriage. "If allowed to limit or reduce the life estate, it would be giving effect to a provision, in reference to personal

property, imposing, not a partial, but a general restraint upon marriage, by means, not of a precedent, but of a subsequent condition, in the absence of any limitation over, on a failure to comply with the condition." That case, therefore, is not an authority to control in determining the present question. It is to be observed, however, that there is no suggestion or intimation by the court, that there is, or could be urged, a distinction between the case of a condition as applied to a woman, and a like condition as applied to a man, in restraint of a second marriage.

In the courts of England the direct question here presented does not appear to have arisen until very recently. In 1875 the case of *Allen v. Jackson*, L. R. 19 Eq. Cases, 631, was decided by Vice-Chancellor Hall. In that case, the testatrix gave the income of certain property to her niece (who was her adopted daughter) and the husband of the niece during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again, the property should go over. The husband survived the wife and married again; and the Vice-Chancellor held, that the attempted defeasance of the husband's life interest, was void as a condition subsequent in restraint of marriage. He said he could not hold the law to be the same as to the second marriage of a man as it is to the second marriage of a woman. That the law as regards the second marriage of a woman is exceptional, and that he did not think he could extend the exception to the case of a man.

That case was taken into the Court of Appeal (1 Ch. Div. 399), where it was fully argued upon all the principal authorities, before the Lord Justices, James, Mellish and Baggallay; and upon full consideration, they all concurred in holding that the proviso was valid as a condition, and that the gift over took effect; and consequently reversed the judgment of the Vice-Chancellor.

Lord Justice James reasoned the matter upon principle; and he said that as there was no statute or express decision of any court to the effect, that there is any distinction whatever between the second marriage of a woman and the second mar-

riage of a man, he was unable to see any principle whatever upon which the distinction could be drawn between them. He then showed to what injustice and hardship the distinction would lead. In the case of a widow, he said, it has been considered to be very right and proper that a man should prevent his widow from marrying again; and after stating the probable reasons for the rule, he proceeds to show with what reason and force they apply to the case of a gift or devise to a man with condition that he should not marry again. Suppose, he said, "we had the case of a married woman having property which she had power to dispose of by her will, and she left it to her husband by reason of his being the widower, and for the purpose of enabling him to perform his duties properly as the head of the family which she may have left; it would be monstrous to say that when she provided for the contingency of the husband marrying a second time, and having a new wife and a new family, she should not be able to say, 'In that case he is to lose the estate, and it is to go over for the benefit of my children.'" "In this particular case," speaking of the case before him, "it was not the wife who was doing it, but it was a person who places herself in the position of the wife—the wife's mother—and who says, making a provision for her adopted daughter, that she gives her the income of her property for her life, and then gives it after her death, to her surviving husband, evidently in his character of widower, with a declaration that if he should marry again it should go over to the child of the daughter who was the first object she intended to provide for—a most reasonable and proper provision, with respect to which it seems impossible to suggest that there is any ground of public policy against it."

In the reasoning of Lord Justice Mellish he was equally explicit in holding the condition against the second marriage of the husband valid, and the gift over on breach of the condition effectual. And in the concurring opinion of Justice Baggallay, the present state of the English law upon the subject is summed up and stated with admirable clearness. He says: "Now the present state of the law as regards conditions in restraint of the second marriage of a woman is this, that

they are exceptions from the general rule that conditions in restraint of marriage are void, and the enunciation of that law has been gradual. In the first instance, it was confined to the case of the testator being the husband of the widow. In the next place, it was extended to the case of a son making the will in favor of his mother. That, I think, is laid down in Godolphin's Orphans' Legacy, p. 45. Then came the case before Vice-Chancellor Wood of *Newton v. Marsden*, 2 J. & H. 356, in which it was held to be a general exception by whomsoever the bequest may have been made. Now the only distinction between those cases and the present case is this—that they all had reference to the second marriage of a woman, and this case has reference to the second marriage of a man; but no case has been cited in which a condition has been held to be utterly void as regards the second marriage of a man; and following the analogy of the other cases, there seems no reason at all why a distinction should be drawn between the two sexes as regards this matter. It appears to me that this condition is one which may fairly be treated as valid, and I think so the more for this reason. Here is a gift in favor of a man, which, if he is not deprived of it on the occasion of his second marriage, he may very probably or very possibly settle upon a second wife, and altogether deprive the original family, which was the object of the testatrix's bounty."

We have thus stated somewhat at large the reasoning of that case, because of the entire absence of any direct authority in our own courts; and the conclusion of the Court of Appeal, founded as it is upon such cogent reason, and deduced from the principles of the common law, commends itself strongly to our assent. In the absence of any binding authority to the contrary, we are of opinion that there is no good and substantial ground for maintaining a distinction between a condition imposed in restraint of a second marriage of a woman and a like condition in restraint of a second marriage of a man. As the one is valid and effectual so is the other; and we therefore hold that the devise over to the plaintiff in this case, on breach of the condition by the defendant, is valid, and that the plaintiff is entitled to recover.

There is another question raised in this court, and that is that the property sued for is not described in the declaration with sufficient certainty to entitle the plaintiff to recover. But that question was not raised in the court below, and the case was heard and decided upon an agreed statement of facts. The question not having been raised below, cannot be raised in this court for the first time. (*American Coal Co. v. County Commissioners of Alleghany County*, 59 Md. 185.) Besides, by the agreed statement of facts, all errors and informalities in pleading were expressly waived. That objection, therefore, cannot prevail.

We shall affirm the judgment appealed from, and direct final judgment to be entered in accordance with the agreed statement upon which the case was tried.

Judgment affirmed.

Conditions against remarriage.—In England a gift over on the marriage of a widower is, as it should be, on exactly the same footing as a gift over on the marriage of a widow. *Allen v. Jackson*, 1 L. R. Chan. Div. 399; 45 L. J. Chan. Div. 310; 33 L. T. (N. S.) 718; 25 W. R. 303.

This is the leading case and settles the law in this particular.

In New York a condition essentially opposite, that a man should renounce the Roman Catholic priesthood and marry, was held valid. *Spencer v. See*, 5 Redf. 442.

It is well settled that a condition against the remarriage of the testator's widow, whether there is a gift over or not, is valid and will be enforced. *Barton v. Barton*, 2 Vern. 309; *Newton v. Marsden*, 2 J. & H. 356; *Labane v. Hopkins*, 10 La. Ann. 466; *Cornell v. Lovett*, 35 Penn. St. 100; *Walsh v. Matthews*, 11 Mo. 181; *Linder v. Newson*, 24 Ga. 189; *Little v. Bidwell*, 21 Texas, 597; *Giles v. Little*, 2 McCrary's C. C. 370; *Hogan v. Curtin*, 88 N. Y. 163; *Frey v. Thompson*, 66 Ala. 287.

Conditions in general restraint of marriage are void. *Reves v. Herne*, 5 Vin. Ab. 843, pl. 41; *Otis v. Prince*, 10 Gray, 581; *Maddox v. Maddox*, 11 Gratt. 804; *Williams v. Cowden*, 18 Mo. 211.

But a condition to marry, or not to marry, any particular person, is valid. *Davis v. Angel*, 4 De G., F. and J. 524; s. c. 81 Beav. 223 (*Campbell, L. C.*); *Finlay v. King*, 3 Pet. 346.

Also a condition, even in a case of real estate, requiring the marriage to be by a particular ceremony, has been upheld. *Houghton v. Houghton*, 1 Moll. 611.

A condition against marriage before twenty-one years of age is good. *Stackpole v. Beaumont*, 3 Vcs. 89; *Shackelford v. Hale*, 19 Illinois, 213.

In the latter case such a condition was held *in terrorem* as to the gift of personalty, but valid as to real estate.

A condition requiring marriage with consent of parents or guardian, is valid. *Collett v. Collett*, 85 Beav. 812; *In re Stephenson*, 18 W. R. 1066; *Dawson v. Oliver*, Massey, 2 L. R. Chan. Div. 753; *Collier v. Slaughter*, 20 Alabama, 268.

If the person whose request is required die before giving the consent, the condition is void as being in general restraint of marrying. *Jones v. Suffolk*, 1 Bro. C. C. 528; *Peyton v. Burr*, 2 P. W. 636.

Where several persons are to consent, all of them must concur. *Clarke v. Parker*, 19 Vesey, 1.

Where consent is required, subsequent approbation is not sufficient. *Fry v. Porter*, 1 Ch. Cas. 188; *Reynish v. Martin*, 3 Atk. 380.

OYSTER vs. OYSTER.

[100 Penn. St. 538.]

"CHILDREN" A WORD OF PURCHASE.

In a devise by testator to his son, of his farm, "for his support and estate, to be and remain bequeathed to his children during their natural life," the word "children" is a word of purchase, and the son takes a life estate.

ERROR to the Court of Common Pleas of Cumberland county.

Simon Oyster died seized of a large amount of real estate. He left surviving a widow and a number of children. Simon W. Oyster, to whom the devise in question is made, was unmarried at his father's death, but has since married and has children. In 1882 he contracted to sell the devised farm to the defendant by deed in fee simple and clear of all incumbrances. A deed signed by plaintiff, his wife and testator's widow, was tendered and refused, and this action was brought upon a case stated.

S. Hepburn, Jr., for plaintiff in error.

John Hays, for defendant in error.

PAXSON, J. The single question in this case is whether the word "children," in the third clause of Simon Oyster's will, is a word of limitation or of purchase. The learned judge below held that under the said clause the testator's son, Simon Washington Oyster, took an estate tail, which under our statute of 27th April, 1855, is enlarged into a fee simple. The operative words of the clause are as follows: "I give and bequeath to my son, Simon Washington Oyster, my farm, in East Pennsboro', county of Cumberland, * * * for his support and estate, to be and remain bequeathed to his children during their natural life."

Without reviewing the learning upon this subject, it is sufficient to say that the authorities are uniform that "children" is as certainly a word of purchase as "heirs of the body" are words of limitation. (*Guthrie's Appeal*, 1 Wright, 9; *Taylor v. Taylor*, 13 P. F. S. 481.) This is the general rule, and the exceptions which from time to time have been recognized do not impair the rule itself. There are many instances in our State where "children" has been held to be a word of limitation, but in all of them such construction was clearly in accord with the intent of the testators as gathered from the four corners of the will, as when "children" has been used with "heirs of the body" or "issue" as its synonyms.

The ruling of the court below was based mainly upon the supposed intent of the testator; the learned judge being of opinion that he employed the word "children," not in its usual sense as a word of purchase, but in the more comprehensive sense of a word of limitation, pointing out the course of descent through the entire line of lineal heirs; and that, as there was no limitation over, the presumption is that he intended to dispose of his whole estate.

This course of reasoning is not without force, but we think it insufficient to overturn the legal and technical meaning of the testator's language. The intent of a testator is always impor-

tant in the construction of a will, where such intent can be gathered from the face of the will with reasonable certainty. But too much care cannot be exercised to avoid setting aside the expressed intention for a supposed intention. In the former instance we have a rule which may be followed with mathematical precision, which lawyers and conveyancers understand, and in regard to which they can safely advise their clients; while in the latter case we are involved in speculation and uncertainty, and the result at last is but a guess, and not always a correct one. Mr. Jarman says, in his work on Wills, vol. 3, p. 708: "Words and limitations may be transposed, supplied or rejected, where warranted by the immediate context or the general scheme of the will; but not merely on a conjectural hypothesis of the testator's intention, however reasonable in opposition to the plain and obvious sense of the language of the instrument." This principle is recognized by Mr. Hawkins and other text writers, and runs throughout our entire line of cases.

The will before us was probably drawn by the testator himself. We have examined it in vain for anything that clearly indicates that he used the word "children" in the third clause as a word of limitation. If such intent does not clearly appear, it does not appear at all for the purposes of this case, as the legal and well-understood meaning of the word "children" cannot be overturned upon mere conjecture. The third clause of the will, standing alone, evinces an intent to give his son Simon the farm for his support during his life. It is then given to his (Simon's) children, during their natural life. The gift to the children means something. It was intended to take effect in the future; the children were to take as purchasers, as a gift from the testator, and by virtue of his own power to dispose of the land. Just what estate the children take under the will, is a question that does not arise in this case. There is no remainder over on failure of children, and, while this is a circumstance entitled to some weight, it is not controlling. (*Hoffner v. Wynkoop*, 1 Outerbridge, 130.) If, upon such failure, the testator intended the farm to revert to his estate, the law would carry it there as effectually as would a special direction in his

will. He may have relied upon the law for this purpose, or the possibility of Simon's dying without children may never have occurred to him.

There is nothing in the remainder of the will in conflict with this view. It is true, in a single instance he uses the word "children" as the equivalent of "heirs," referring to his own children, and his own heirs, in the first and second paragraphs of the will. But nowhere, in speaking of the children of his sons and daughters, does he use the word indiscriminately with heirs of the body or issue, and all of them as meaning an entire line of lineal descent. *Haldeman v. Haldeman*, 4 Wright, 29, relied upon by the defendant in error, was ruled mainly upon the ground that the words referred to were so used.

While the testator may have intended the word "children" as a word of limitation, such fact does not clearly appear, and it would not be safe for us to assume it.

We are of opinion that the word "children," in the third clause of Simon Oyster's will, is a word of purchase. It follows that Simon Washington Oyster took but a life estate in the farm, which is the subject of this contention.

The judgment is reversed, and it is ordered that judgment be entered in favor of Napoleon K. Oyster, the defendant below upon the case stated.

MAYBURY vs. GRADY.

[67 Alabama, 147.]

SPECIFIC LEGACIES.—ABATEMENT OF DEVISES AND LEGACIES ON FAILURE OF ASSETS.

A direction that one-half of the recovery from a litigated claim should be paid to testator's wife, and the balance should be paid in certain fixed amounts, or ratable proportions, to other persons, creates specific legacies.

Specific devises and specific legacies abate ratably in case of a deficiency of assets to pay debts.

APPEAL from the Chancery Court of Mobile.

The bill was filed by appellants as executors of D. O. Grady, deceased, for instructions and for the construction of deceased's will.

The following are the material provisions of the will: "3. After the payment of my just debts and funeral expenses, etc., I give my wife A. one-half of my personal property. 4. I give to my wife A., in lieu of her right of dower, one-third of the net rents of my lands for and during her natural life, to be paid annually by my executors. 5. I give all the rest and residue of the estate of which I may die seized and possessed, including real and personal property, to my executors in trust, to take possession of and hold all the real estate of which I may die seized and possessed, and hold and rent the same from time to time, and receive the rents, etc., therefor, pay taxes thereon, and keep the property insured at their discretion, and pay to my wife A. one-third of the net rents, etc., arising therefrom, in lieu of her right of dower in the same, for her natural life; and to take and hold all the balance of my real estate of every kind, except the part of the personal property given to my wife, which my executors shall pay over to her, and except the contingent legacies hereafter given, and to hold said estate, both real and personal, and manage and control the same until my daughter Carrie shall reach the age of twenty-one years, when all of said property, except that portion given to my wife and said contingent legacies, shall be by my said executors delivered over to my said daughter, my executors retaining reasonable compensation for their trouble as such, etc.; or, if my daughter should die before she attains the age of twenty-one years without leaving any child surviving her, all of said estate shall be delivered to 'the Catholic Male and Female Charitable Societies of Mobile,' but if she die before attaining the age of twenty-one years leaving a child, or children, then said property to be delivered to said child or children, share and share alike. 6. It is my will and desire, that if my cotton claim which is now pending in the Court of Claims at Washington, should be decided in my favor, and any sum should be hereafter realized therefrom, that one-half of the net proceeds thereof

shall be paid to my beloved wife. Then, from the other half of the proceeds—provided the said half shall amount to the sum of \$25,000—it is my will and desire that the sum of \$10,000 shall be paid to the Rt. Rev. the Catholic Bishop of Mobile, at the time being—in trust—to be by him expended in completing the Cathedral of Mobile; but should one-half of the net proceeds amount to a sum less than \$25,000, then it is my desire that two-fifths of said half shall be paid to and expended by the said Bishop as aforesaid. And if there should be any recovery of said cotton claim as aforesaid, it is my will and desire that after paying one-half of the net proceeds thereof to my said wife and the special legacy last above mentioned, the sum of \$2,000 shall be paid to each of the following persons, to wit: To my brothers, John Grady and Simon Grady, to my sister Bridget Eagan, to Margaret Cogan and Mrs. Maxwell, of the residue of the half of said net proceeds; but if said residue shall not be sufficient to pay each of said special legacies, then, it is my will and desire that they should be paid *pro rata* out of said residue. 7. My executors shall, from time to time, appropriate money out of the estate at their discretion for the support, education, and maintenance of my daughter Carrie.” This clause then appoints the executors, viz.; Rt. Rev. John Quinlan, Bishop of Mobile, and his successors in office, J. T. Maybury, Charles Cavaroc and M. J. Brennan, guardians of his daughter. “8. It is my will and desire that all my real estate shall be kept together, and no portion thereof sold or alienated, either by my said executors or by my daughter, Carrie Grady, or by the ‘contingent legatees’ into whose possession it may come in the event of my daughter’s death before she reaches the age of twenty-one years. 9. In case there is any surplus from the net annual revenue from the realty, after disbursing the moneys given in the will, then my said executors shall put by the said surplus as a contingent fund, to be applied by them at any time, if necessary to the liquidation of any debts which may be incurred by my estate which the current net revenue may be insufficient to extinguish; and in case the one-third of the net amount of the annual rents, issues and profits arising from my estate shall, in the opinion of my said executors, be at any time

insufficient for the support and maintenance of my beloved wife, then my said executors are hereby authorized to appropriate from said contingent fund, if any there be, moneys at their discretion for her support. 10. It is my will and desire that my said executors shall have full power and authority to expend money out of my estate at their discretion to pay for my burial expenses, and to build a tomb and monument over my grave, if they think proper."

The bill alleged an excess of debts over the personalty assets of \$8,000; that testator's widow and daughter had been supported out of the income of the estate; that the suit upon the cotton claim referred to had been successful, and that the income from the real estate was no longer sufficient for the support of the widow and daughter.

Anderson & Bond and Henry St. Paul, for appellants.

R. P. Deshon, for appellee.

STONE, J. The argument pressed upon us by appellants rests mainly on the assumption that Grady, by his will, specifically disposed of the fund to be realized on the cotton claim, while the disposition of his lands for his daughter rests on a clause, which is, in its nature, residuary. We cannot assent to this interpretation. There can be no question that the bequest, contingent on the success of the cotton claim referred to, is specific, so far as it proposes to give of that fund to his wife, to the completion of the cathedral, and the pecuniary legacies to his brothers and sisters. These legacies are made to depend expressly on the successful issue of that claim, and are payable only out of the money thereon to be realized. If that suit was unsuccessful the legacies failed. There are specific legacies, in contradistinction to general pecuniary legacies, which are payable out of general assets, and are to be abated in case of a general deficiency; and, to demonstrative legacies, which are bequests of specified sums of money, with superadded direction to pay them out of a particular fund. In the latter case, if the designated fund fail, the legacy will be payable out of the gen-

eral assets not specifically bequeathed, or out of the fund covered by residuary bequests. In this case, if the fund failed, the legacies were never to take effect. (*Lightfoot v. Lightfoot*, 27 Ala. 351; *Meyers v. Meyers*, 33 Ala. 85; 2 Lomax on Ex'rs, [33] 69, *et seq.*; 1 Rop. on Leg. 201, *et seq.*; *Id.* 191; *Wallace v. Wallace*, 23 N. H. 149.)

We hold, also, that there is an express devise of the real estate to testator's daughter, and that she does not take as a mere residuary legatee would take. (*Wallace v. Wallace*, *supra*; Lead. Ca. in Eq. Vol. 2, pt. 1, 323, *et seq.*)

In addition to the legal intendment, Mr. Grady's will makes the payment of his debts a special charge on his personal property. Its language is: "After the payment of all my just debts and funeral charges and expenses, I give and bequeath unto my beloved wife, Agnes M. Grady, one-half of my entire personal property," etc. With the exception of the cotton claim, then of contingent value, the will makes no disposition of the personal property and effects, save of that which should remain after the payment of testator's debts. The will then specially devises and bequeaths to his wife and daughter, his entire real estate, and the residuum of the personalty, except the cotton claim. Testator, then, in specific legacies, gave to his wife, of the fund to be realized on the cotton claim, one-half—and of the residue he made such disposition to his brothers and sisters, and towards the completion of the cathedral, in Mobile, as that the collective bequests from this fund amounted to forty-five thousand dollars. The bill fails to show the amount realized on the cotton claim, but contents itself with the following general averment: "Your orators show unto your honor that said cotton claim was finally decided in favor of said executors, and that your orators as executors complied with the terms and directions of said will as to the disposition of said fund, as specifically and specially directed by the testator, and thereby said fund was exhausted, and none of it now remains in their hands." This averment is objectionably general and indefinite. The bequests out of this fund, as we have shown, are specific, and they are to be paid out of the net proceeds of the cotton claim. If the net proceeds amount to fifty

thousand dollars, then one-half, \$25,000, to Mrs. Grady, \$10,000 to the cathedral, and \$10,000 to the brothers and sisters, will aggregate forty five thousand dollars—and this leaves five thousand dollars for the daughter. If the net sum realized exceeded fifty thousand dollars, then the residue for the daughter would be increased.

In the 9th item of the will is this clause: "And in case the one-third of the net amount of the annual rents, issues and profits arising from my estate shall, in the opinion of my said executors, be at any time insufficient for the support and maintenance of my said beloved wife, then my said executors are hereby authorized to appropriate from said contingent fund, if any there be, moneys at their discretion for her support." Possibly the surplus, if any, of the cotton claim was expended in this way. The construction placed on the will by the executors and their counsel would have justified such expenditure, and would authorize the averment in the bill, that the money realized on the cotton claim was disposed of "as specifically and specially directed by the testator." The bill should have set forth, with particularity, the sum realized on the cotton claim, and how it was expended. This, for reasons to be hereafter shown.

Many provisions in the will of Mr. Grady furnish unmistakable evidence that he considered his personal estate, independent of the cotton claim, amply sufficient to pay his debts, and leave a surplus. He bequeathed one-half of his personal property, after the payment of his debts, to his wife, and the other half to his daughter. He gave to his executors power and authority to expend money out of his estate at their discretion, to pay his burial expenses, and to build a tomb and monument over his grave. The question will doubtless arise, and should be decided, what did the testator mean by the words, "my estate," in the 10th item of his will? It is from this source he directs his executors, at their discretion, to pay for his burial, and for a tomb and monument. In the fifth item, testator bequeaths and devises to his executors the remaining half of his personal estate, and all his real estate, in trust, first, to pay to his wife annually one-third of the net rents of the realty, "provided she receive the same in lieu of her

dower in and to said lands and premises." He then adds: "and to take and hold all the balance of my estate of any and every kind or nature whatsoever," except the half of his personal property given to his wife, and except the contingent legacies out of the cotton claim, "to hold said estate both real and personal, and manage and control the same, until my beloved daughter, Carrie Grady, shall reach the age of twenty-one years, when all said property as aforesaid, except that portion devised to my beloved wife, and the contingent legacies hereinafter named, together with all that shall remain of the contingent fund hereinafter named, shall be, by my said executors, delivered over to my said daughter, Carrie Grady—my said executors retaining, from year to year, reasonable and proper sums of money, as compensation for their trouble and expense as such executors." In the 7th item is this language: "It is my will and desire that my said executors shall, from time to time, appropriate moneys out of the estate, at their discretion, for the support, maintenance and education of my said daughter, Carrie M. Grady." In the 8th item, the testator speaks of all the lands as "my real estate." We think testator, by the terms "my estate," in the 10th item, intended to embrace the property, real and personal, given to his daughter, Carrie, for the following reasons: First, he had directed that part of his estate to be kept together until Carrie reached the age of twenty-one, while, as to the residue of his estate, he gave no such direction. True, as to one-third of the rents and income of the lands so ordered to be kept together, the remark above does not apply, during the life of Mrs. Grady; but this was given to her in lieu of dower, over which she could exercise no power of disposition, testamentary or otherwise. He had no power to fasten a charge on this interest, without the wife's consent, express or implied. In the second place, testator, by devise and specific bequest, had disposed of his entire property, real and personal, in such form as that all would soon pass from his executors, save that to be kept together for his daughter. Third, testator, as shown above, speaks of the provision made for his daughter, as "the estate," excluding therefrom the other legacies contained in the will. We hold, therefore, that a dis-

cretion was given to the executors, to defray the expenses of the burial, and to erect a suitable tomb and monument, out of the income of the real estate and the residue of the cotton money which were given to the daughter.

We have shown that the devise of the real estate, and what we called the contingent legacies, are all in their nature specific. These comprise all of the estate, save what is, in the 3d item of the will, called the "entire personal property." The bill avers there is now no personal property, and that, at testator's death, the debts of the estate exceeded the value of said entire personal property, by some eight thousand dollars. One object of the bill is to fasten a charge on the lands devised to the daughter for the alleged deficiency. The daughter is still an infant of immature years, and it is contended for her that the money bequests, product of the cotton claim, must be first exhausted before lands devised can be made subject.

In this, as in most of the States composing the Union, lands as well as personal property are charged with the payment of decedent's debts. Such is the law of England now; but here as well as there, in the absence of testamentary direction, personal property is the fund primarily chargeable with the payment of debts. In the multiform conditions in which the estates are left, sometimes by the caprice, but more frequently by the oversight, if not ignorance of testators, the question of priority of liability between claimants under wills, in different right, has been many times before the courts. Some of the rules declared are so remarkable, and so clearly right, that we find no contrariety of opinion upon them. Upon others, courts of the highest character, and the same court at different times, have differed. In *Livingston v. Newkirk*, 3 Johns. Ch. 312, the question of primary liability arose between lands descended and lands devised. The opinion of the chancellor went no farther than the wants of the case. He consequently stated the order of marshaling to that extent only. He said: "The order of marshaling assets towards payment of debts, is to apply—1. The personal estate; 2. Lands descended; 3. Lands devised." In *Donne v. Lewis*, 2 Bro. C. C. 257, Lord Thurlow stated his idea of the order in which assets were to be applied, to

be—1. The general personal estate ; 2. Ordinarily speaking, estates devised for the payment of debts ; 3. Estates descended ; 4. Estates specifically devised, even though charged generally with the payment of debts. In 2 Lomax on Ex'rs (255) 426, the rule is stated as follows : 1. Personal estate not specifically bequeathed, or exempted expressly, or by plain implication, from the payment of debts ; 2. Lands expressly devised for (not merely charged with) the payment of debts ; 3. Descended estates ; 4. Lands charged with the payment of debts. In Story's Eq. Jur. § 577, the rule is stated substantially in the language of Lord Thurlow, and is confined to four classes. So Chancellor Kent adopts the same classification in his commentaries (vol. 4, marg. p. 421). In *Hays v. Jackson*, 6 Mass. 147, decided in 1809, Parsons, C. J., stated the rule in equity, for marshaling assets, to be settled as follows : "1. The personal estate, excepting specific bequests, or such of it as is exempted from the payment of debts ; 2. The real estate which is appropriated in the will as a fund for the payment ; 3. The descended estate, whether the testator was seized of it when the will was made, or it was afterwards acquired ; 4. The rents and profits of it received by the heir after the testator's death ; 5. The lands specifically devised, although they may be generally charged with the payment of the debts, but not specially appropriated for that purpose." It will be observed that, although all the several statements above are in the main harmonious, neither of them covers the whole possible ground. Suppose the case of a devise of real estate, and a bequest of personal property, each expressly subject to the payment of debts, without direction or intimation as to which species of property shall be first made liable, and the debts exhaust only a part of such devised and bequeathed property, shall the personal property be first taken, or shall the burden fall alike, and *pro rata*, upon each species of property ? Or, suppose the more common case, which we have shown is the case in hand, where the testator devises his lands, in terms which are in substance specific, and bequeaths his personal property in specific legacies, leaving an insufficiency of property not thus devised and bequeathed, for the payment of his debts, are there any priorities of liability as between

the real and personal property thus disposed of by the will? These are possible categories which are not provided for in any of the rules stated above. We confine what we have to say to the last of the supposed cases. We cannot arrive at the intention of the testator, for evidently he intended, alike and equally, that the devise and bequests should have full effect. As said by Justice Gibson, in *Shaw v. McCameron*, 11 Serg. & R. 252, "It is probable the matter never was the subject of his thoughts, and we are compelled to look for an *intention* where none in fact exists." Manifestly Mr. Grady had the conviction that what he, in the third item of his will, designates as his "entire personal property," would pay his debts and funeral expenses, and leave a surplus which he bequeathed in equal parts to his wife and daughter. If he had not been so convinced, the care and skill with which his will is prepared give assurance that he would have made other provision to meet the deficiency. The law, common and statute, makes the personal property the primary fund for the payment of debts, unless such personal property is disposed of in specific legacies, or the will expressly charges the debts on the realty in the first instance. Hence, when the will does not specifically bequeath the personalty, and does not charge the realty in exoneration of the personalty, the presumption arises that the testator intended the personalty should be first applied to the payment of his debts. All men are conclusively presumed to know the law, and testators are no exception to the rule. When, however, as is claimed in this case, the debts exceed the value of testator's entire property not disposed of by specific devises and bequests, no such presumption can arise. As said by Gibson, J., "the matter never was the subject of his thoughts." In this case it never entered into testator's mind that his personal property, mentioned in the third item, was not amply sufficient to pay his debts and funeral expenses, and, of consequence, he had no intention whatever as to the fund or source from which to provide for the balance of his debts. We cannot suppose he intended to provide against an event, which, if he thought on the subject, appeared to him impossible. Prudent men may provide

for events, within the range of possibility. It would be unsafe to travel beyond this in search of an imaginary intention.

In 2 Jarman on Wills, Perkins' ed. (546-7), 391-2, the rule of marshaling assets for the payment of debts is thus stated: "1st. The general personal estate, not expressly or by implication exempted. 2d. Land expressly devised to pay debts, whether the inheritance, or a term carved out of it, be so limited. 3d. Estates which descend to the heir, whether acquired before or after the making of the will. 4th. Devised or bequeathed property, real or personal, which is charged with debts and those specifically disposed of, subject to such charge. 5th. General pecuniary legacies *pro rata*. 6th. Specific legacies *pro rata*. 7th. Real estate devised." It will be seen that in the 4th class, no discrimination is made between devised real property, and bequeathed personal property, while in the 6th and 7th classes, specific legacies are first made liable before lands devised can be subjected. What are included in Mr. Jarman's 6th and 7th classes, are alone involved in this suit; for we are dealing alone with devised lands and specific legacies. There are many highly respectable authorities which uphold Mr. Jarman's distinction. Perhaps a majority of the older American cases point that way. The rule is so stated in *Hoover v. Hoover*, 5 Barr, 351, although it was *dictum* so far as it affects this case. So what Lee, J., said on this point in *Elliott v. Carter*, 9 Gratt. 541, is *dictum*. The following authorities favor this view: *Rogers v. Rogers*, 1 Paige, 188; *Shreve v. Shreve*, 2 Stockt. Ch. 385; *Worley v. Worley*, 1 Bailey's Eq. 397; *Cornwall v. Cornwall*, 12 Simons, 298.

Adams, in his work on Equity, (263) 590, groups the scale of liability for debts into six classes, his 6th being: "Personal and real estate, or whether the personalty is first liable. It has been specifically given, and not charged with debts." On page (265) 597, this author says: "In regard to assets of the fourth and sixth classes, where both personal and real estate are included, a question has arisen, whether the personal and real estate should contribute *pro rata*, or whether the personalty is first liable. It has been determined that in both cases there is a liability *pro rata*, and that accordingly if land be

devised, and a testator die indebted by a bond, a specific legatee may compel the devisee to contribute." This doctrine meets the approbation of Mr. Roper in his work on Legacies, vol. 1, p. 358, *et seq.* (*Long v. Short*, 1 P. Wms. 403, is the leading authority on this question.) It was decided by Cowper, Lord Chancellor, in 1717. The question was between a devisee of lands held in fee, the donee of a leasehold estate held for a term of years, and the legatee of an annuity to be paid out of the leasehold estate. There was a deficiency of assets to pay the specialty debts, and the bill was filed by the executor, who was the heir, to marshal the assets, and to have it determined whether the said debts should be charged on the real or leasehold estate. The Lord Chancellor decreed: 1st. That a devise of a rent charge out of a term, is as much a specific devise, as if it had been of the term itself. 2d. That the devise of a term for years is as much a specific devise as a devise of lands in fee. Wherefore, each being equally specific devises, it would, in this case, be an equal disappointment of the testator's intent, to defeat either, by subjecting it to the testator's debts. * * * So that, to prevent the disappointment of the testator's intent, the court thought it reasonable that the devise of the fee simple estate, and the devisees of the lease and annuity, should each contribute to the debts by specialty, in proportion to the value of the respective premises.

Tombs v. Roch, 2 Coll. 490, came before the able equity lawyer, Sir Knight Bruce, Vice-Chancellor. In an argument that is certainly able, we may say exhaustive, he ruled that in case of specific legatees and devisees, where there is a deficiency of other assets to pay debts, the two classes must contribute ratably. That opinion, in its clearness and force, is a model of judicial writing, and may be consulted with profit by any inquirer after truth. One expression we cannot forbear to copy. He said: "I consider it to be perfectly correct in principle to say, that every will ought to be read as in effect embodying a declaration by the testator, that the payment of his debts shall be as far as possible so arranged as not to disappoint any of the gifts made by it, unless the instrument discloses a different intention." In *Silk v. Prime*, 2 Coll. 509,

after disposing of all assets on which a prior liability rested for the payment of debts, the court declared, in case the same shall prove insufficient, "such deficiency is to be made good out of the said testator's personal estate specifically bequeathed, and the real estate at Outnewton, devised by his will to Sarah Thompson, his mother, in fee; and the said estates are to contribute in proportion to such deficiency."

Young v. Hassard, 1 Jones & La Touche, 466, came before Sir Edward Sugden when he was Lord Chancellor. It was urged before him that *Cornwall v. Cornwall*, *supra*, had overruled *Long v. Short*. He said: "I confess I was surprised by the statement that *Long v. Short* had been overruled. I have always considered it as a binding authority; have advised on the strength of it; cited it, and seen it acted upon; and I think it to be regretted, that that which has for so many years been considered as a settled rule of law, should be now disturbed. I have a very great respect for the learned judge [Sir Lancelot Shadwell, V.-C.] by whom the case of *Cornwall v. Cornwall* was decided; but I cannot say that I have any doubt that *Long v. Short* is still a binding authority. The decision in that case depended on this, that, at law, all the funds were liable to the debt; and the question was, what was the intention of the testator? The devise of the lands and of the chattels real, and of the annuity, being specific, Lord Cowper referred to the statute of fraudulent devises, and said that that statute made real estate in the hands of the devisee, liable to the payment of the specialty debt; and, therefore, finding that all the funds were liable—for this court does not pretend to make a fund liable to the payment of a demand, to which it was not liable before; it never creates a liability, but only, by marshaling funds, prevents a creditor from disappointing the intention of the testator—and finding that it was the clear intention of the testator to give the chattel interest in the legatee, just as he had given the real estate to the devisee, he was of opinion that they ought to bear the burden ratably; and that, in that manner, the intention of the testator would be effectuated. * * I see nothing to impeach the decision in *Long v. Short*; and if I were now called on to decide the question, I

should feel myself bound to support the authority of that case."

In *Armstrong's Appeal*, Sharswood, J., said: "It was settled in England by *Long v. Short*, that specific devises of land and specific bequests of personalty, must abate ratably in case of a deficiency of assets for the payment of the bond debts of the testator, because both lands and chattels were liable in law for those debts; and it was equally the intention of the testator, that the legatee should have the chattel, and the devisee the land. In this State, where lands have always been assets for the payment of debts by simple contract, as well as by specialty, the rule is general—that whenever there is a deficiency of assets to pay both debts and legacies, specific devisees and specific legatees shall contribute proportionably." (63 Penn. St. 312; *Hollowell's Estate*, 23 Penn. St. 223; *Heusman v. Fryer*, 3 Ch. App. Cas. L. R. 420; *Brunl's Will*, 40 Mo. 266; *Chase v. Lookerman*, 11 Gill & Johns. 185; *Gervis v. Gervis*, 14 Sim. 654.) In Leading Cas. in Eq. vol. 2, part 1 (notes to *Aldrich v. Cooper*, 8 Ves. 308), beginning at page 323 of 4th Amer. ed., is a full discussion of this question.

There are cases in which testators blend or mix realty and personalty in the creation of a source or fund for the payment of debts and legacies, which are governed by their own peculiar circumstances. They shed no direct light on the subject we are discussing. (*Broughton v. James*, 1 Coll. 26; *Atty.-Gen. v. Southgate*, 12 Sim. 77; *Roberts v. Walker*, 1 Russ. & Myl. 752; *Hassanclever v. Tucker*, 2 Bin. 525; *Whitman v. Norton*, 6 Bin. 395; *Lewis v. Darling*, 16 How. U. S. 1.) There is nothing in *Carter v. Balfour*, 19 Ala. 814, opposed to the views expressed above.

We hold, that after exhausting what testator, in the 3d item, calls "my entire personal property," if there remained any portion of the debts of the estates unprovided for, such excess of debts is a common and equal charge upon the whole balance of the estate, real and personal, less the third of the land rents, given in lieu of dower, to Mrs. Grady, during her lifetime.

We have shown heretofore what testator intended by the

terms "my estate," in the 10th item of his will. We think he meant to confer on his executors a discretion in the use of what he had given to his daughter, or rather its income, for the purpose therein expressed, should the personal property prove insufficient for the purpose, after paying the debts. If this discretionary power was exercised, and any portion of the income of the lands devised to the daughter was so used, then such sum must be excluded from the computation, in marshaling. It gives to the daughter no right to contribution from the legatees. If, however, any portion of the income and rents derived from the lands devised to her, or, of the surplus of the cotton claim, which the will gives to her specifically—to wit: one-tenth of any possible recovery—has been employed and consumed in the payment of testator's debts, to the extent of such use she is entitled to contribution from all the legatees *pro rata*.

The bill in the present case is filed by the executors, and seeks to charge the unpaid balance of the debts on the lands devised to the daughter. The averments are not definite enough to show the character of the debts, and the exact amount of the original deficiency. There is, also, a strong implication in the averments of the bill that part of the income of the real estate devised, and, perhaps, the daughter's share of the cotton money, have been used in the payment of debts, or, perhaps, in the expenses of administration; and, in this way, the alleged original deficiency of eight thousand dollars has been reduced to about five thousand dollars. The bill should correctly set forth how this matter stands; for in taking the account, with a view to marshaling, the daughter will be entitled to a credit for the sum of her rents and cotton money so used. It is no answer to this view that the executors have paid the pecuniary legacies. They should have retained enough to meet all debts, certain and contingent; and in the assertion of any claim to fasten the charge of the unpaid debts on the lands, they stand in no more favorable light than if the entire proceeds of the cotton claim remained in their hands. They paid it in their own wrong, and must abide the consequences if they have no recourse over against the legatees. Our purpose in what we

have said, is to declare that any part of the income of the daughter's devised estate, or of her share of the cotton money, has been expended in paying debts, or expenses of administration, such sums must be brought into the account in any process of marshaling, and she allowed a credit therefor.

The present bill, as we have seen, is by the executors; and one of its purposes was to raise a fund with which to repay the sureties on a *supersedeas* bond, the moneys they had been required to pay on the affirmed judgment of Leach, Harrison & Farwood, against the executors of Grady, 58 Ala. 339. Those sureties were the sureties, not of the estate of Grady, but of his executors. When they paid the money, they paid it for the executors, and not for the estate, between which and themselves the execution of the bond created no privity. By the payment, a cause of action at law accrued to them, against the executors, to recover the money thus paid for them; but they acquired no right of action against the estate. If the executors themselves had paid the money, they would have been entitled to a credit therefor in their executorial accounts. If they had otherwise disbursed, according to law, all personal assets with which they were chargeable, the primary fund for the payment of debts, this would give them, the executors, the right to proceed against the specific legacies and devised lands, to have them marshaled, and themselves reimbursed. But, in such proceeding, they must account for all assets realized, and for all *devastavits*, and can only recover for the balance as for an original deficiency of assets. A deficiency caused by their errors in distribution, or, by a want of diligence and prudence in administration, gives them no recourse against remaining assets. (*Pearson v. Darrington*, 11th head-note, 32 Ala. 227-249.) So, there may be cases where sureties, who have paid money for executors, as charged in this case, would have recourse on the devised and bequeathed property for their reimbursement; but, in such case, the proceeding would be governed by the same rules as would obtain in a similar suit by executors themselves. They could only claim to be subrogated to the rights which their principals, the executors, could

enforce against the estate. (*Van Derveer v. Ware*, at present term.)

According to the principles declared above, the bill in the present case is defective. This would secure an affirmance of the decree of the chancellor, but for a question presently to be noticed, there being no motion or offer in the court below to amend the bill. The bill, however, prays a removal of the administration to the Chancery Court, and we think that prayer should have been granted. There are trusts to be executed which are of a very delicate nature, and the estate, being required to be kept together, and the trusts continued for a series of years, we hold that a sufficient excuse is shown by the executors, why the removal should be made at their instance.

Reversed and remanded.

Let the costs of appeal be^d divided equally between appellants and appellees.

RIGGS vs. CRAGG.

[89 New York, 479.]

PAYMENT OF DISPUTED LEGACY UPON APPLICATION OF LEGATEE.

A statute authorizing the payment of a legacy upon an application therefor, and an accounting to which the legatee alone is a necessary party, will not warrant such payment where the legacy is disputed. In such case there must be a final accounting where all the parties who may be affected by the adjudication are in court.

APPEALS from judgments of the general term of the Supreme Court in the first judicial department affirming decrees of the surrogate of New York county, settling the accounts of appellants as executors and as trustees of the will of Elisha Riggs, deceased.

Austen G. Fox, for appellants.

Wm. G. Choate, for respondent.

ANDREWS, Ch. J. The objection that the surrogate had no jurisdiction to render the decrees in question is, we think, well taken.

The proceedings were instituted by the filing of a petition before the surrogate of the county of New York, on the 7th day of June, 1870, by Samuel W. Cragg, administrator of Mary Alice Cragg, deceased, setting forth that Mary Alice Cragg was the daughter of Elisha Riggs, deceased, late of the city of New York, and beneficially interested in the estate of said Elisha Riggs, and in a trust created by his will; that the testator died August 3, 1853, and that his will was duly admitted to probate before the said surrogate, September 27, 1853; that on the same day letters testamentary were issued to George W. Riggs and Joseph K. Riggs, two of the executors named therein; that the testator left personal estate amounting to about \$900,000; that the executors were also by the will appointed trustees of the trust created thereby; that they have never rendered any account of their proceedings as executors, nor as trustees under the will, of the share of the testator's estate set apart for the benefit of his daughter Mary Alice, for life. The petition concludes with a prayer that an order may be issued, requiring the said George W. Riggs and Joseph K. Riggs to render an account of their proceedings as executors, and also as testamentary trustees, and for general relief. The surrogate, upon presentation of the petition, issued a citation pursuant to the prayer of the petition, which was served on the executors. The executors appeared on the return of the citation and filed separate accounts as executors and trustees, viz.: an executors' account extending from August 3, 1853, to May, 1870, and two accounts as testamentary trustees, one extending from August 3, 1853, to June 29, 1860, and the other from the latter date to March 9, 1870. The proceedings finally resulted in two decrees made by the surrogate, February 24, 1881, settling the accounts of the executors and trustees with the estate of Mary Alice Cragg, and adjudging the balance due. By the decree on the executors' account, it was adjudged that there was due to the estate of Mary Alice Cragg the sum of \$50,578 06, which the executors were direct-

ed to pay to her administrator. The account of the executors as testamentary trustees was settled and allowed at \$120,104 44, which sum was adjudged to be the balance in the hands of the trustees to the credit of the estate of Mary Alice Cragg, and which sum, less costs and expenses, was also decreed to be paid by the trustees to her administrator, and in addition the trustees were directed to transfer and deliver to him sixty-six shares of the capital stock of the New York Gas-light Company, and the amount of certain dividends thereon. The decree of the surrogate was affirmed by the general term.

For a proper understanding of the jurisdictional question, it is necessary to refer to certain facts disclosed by the record. The testator, Elisha Riggs, died August 3, 1853, leaving a widow and six children, five sons and one daughter, surviving. Two of his children, William H. Riggs and Mary Alice Riggs, were then minors, the latter having been born June 29, 1839. His will was dated May 17, 1844, to which a codicil was added June 7, 1851. The testator at the time of his death was possessed of a large personal estate and also owned real property, the amount of which does not appear. The will was duly proved, and letters testamentary were issued thereon to George W. Riggs and Joseph K. Riggs, who qualified as executors and who also accepted the trust for the benefit of Mary Alice Cragg created by the will, and have since managed the estate. The testator, by his will, after directing the payment of his debts, and providing for the widow, and making certain bequests, provides, in the *ninth* clause, as follows: "*Ninth*.—All the rest, residue and remainder of my property and estate, both real and personal, etc., I hereby give, devise and bequeath to my six beloved children (naming them) and to their respective heirs, executors, administrators or assigns, in equal portions, or share and share alike, except the portion or share of my said daughter, Mary Alice Riggs, which I dispose of for her sole and separate use and benefit, whether married or unmarried, as follows, that is to say: I give, devise and bequeath the same to my executors hereinafter named, in trust, for her separate use and benefit, during her natural life, to invest and improve the same at their best discretion, and to pay to her,

from and after her arrival at the age of twenty-one years, or marriage, with the consent of her mother, if living, whichever event may first happen, into her own hands, whether married or unmarried, and upon her own separate receipt, to be given from time to time, and not by way of anticipation, the net interest, dividends, or other periodical income thereof; and at her decease, I hereby give, devise and bequeath the capital of her said share, or portion, to her issue, or other descendants, in equal portions, or share and share alike, etc.; and should my said daughter not marry, or marry and have no issue that shall survive her, and should she survive her husband, then, upon her decease, I hereby give, devise and bequeath her share and portion of my residuary estate, both real and personal, to her surviving brothers, and their issue, share and share alike, except that the issue of any deceased brother are to take by representation." The ninth clause further provides that, in case his daughter should marry, and should die, leaving no issue, but leaving her husband surviving, he should receive an annuity of \$1,000, etc. By the tenth clause, the executors are authorized to make advances, from time to time, for the support, maintenance and education of his minor children, during their minorities, not exceeding \$800 a year, and they are directed to keep a separate account with each child, charging him, or her, with such advances.

Mary Alice Cragg became of age June 29, 1860. She was married to the petitioner, Samuel W. Cragg, in 1869, and died March 9, 1870, intestate, and without issue, and the petitioner was duly appointed administrator of her estate. It seems, from what can be gathered from the record, although there is no distinct proof upon the subject, that the executors, from time to time, after the death of the testator, set off portions of the estate to the credit of the trust, but retained a portion of the share of the testator's daughter, as an undivided interest. The surrogate, in stating the executors' account, ascertained, in the first place, the whole income received by the executors, as such, from the death of the testator, in 1853, to the death of Mrs. Cragg, in 1870, and awarded to her one-sixth of the net income for that period, deducting such payments as were prop-

erly chargeable to her. In stating the trustees' account, he charged the executors with the whole income of the trust estate during the same period, and ascertained the balance by deducting therefrom the sums properly chargeable to her, as in the other case. Both accounts are largely made up of income on the one-sixth share of the estate given to Mary Alice for life, which accrued between August 3, 1853, the date of the testator's death, and June 29, 1860, the day on which she reached her majority, and interest thereon. The testator, at the time of his death, owned stock in various railroad and other corporations, upon which, after his death, stock dividends were declared, from time to time, which were received by the executors and trustees, and credited to capital, and not to income, amounting, in the aggregate, to a large sum. The surrogate, in making up the accounts, held that the stock dividends were, as between the life-tenant and the remainderman, income, and not capital, and were to be credited as income in the accountings.

The citation, as has been said, by which the proceeding was initiated, was a citation to the executors only. The residuary legatees, other than the executors, have not been brought in, and they were in no way made parties to the proceeding, or to the decrees of the surrogate. So far as appears, they were neither served with process, nor did they appear, or take any part, in the litigation. Several interesting and important questions, involved in the determination of the surrogate, have been presented upon the appeal, and argued with great ability by the respective counsel. One of these questions respects the right, as between life-tenant and remainderman, to the income on the share of Mary Alice Riggs, under the will of her father, which accrued during her minority. It is claimed, on the part of the respondent, that, by the true construction of the will, the income of her share which accrued during her minority, beyond the sums directed to be paid for her support and maintenance, was to be accumulated, and to be paid to her on arriving at the age of twenty-one years; and that this construction is necessary to effectuate the intention of the testator to give to his daughter the "use and benefit" of the equal one-sixth part

of the estate during her life ; and other provisions of the will, not herein referred to, are relied upon as confirming this construction. On the other hand it is claimed by the executors, that the share of the daughter having been vested in the trustees, upon the trust to "invest and improve" the same, and to pay to her "from and after" her arrival at majority, the "net interest, dividends or other periodical income thereof," it was the intention of the testator that the share should be augmented by adding the surplus income accruing during the daughter's minority, to the capital of the share, and to give to her the income only after that time accruing from the original capital of the share and the additions, and that it is only by this construction that effect can be given to the directions of the testator to the trustees to improve the share given in trust.

When the construction of the will is settled, a further question may arise as to the validity of the trust as a trust for accumulation, and, if void, whether the surplus income goes to the daughter or to the remainderman, as persons entitled to the next eventual estate in the fund.

Another important question involved in the decision of the surrogate, relates to the distribution as between capital and income of stock dividends, declared and received by the executors and trustees during the existence of the life-tenancy. Are stock dividends, representing earnings and profits of a corporation, expended in construction or improvements of the corporate property, declared during the life-tenancy, to be regarded as between the life-tenant and remainderman, as accretions to the capital, or as income? If declared out of accumulated profits earned before the inception of the life-tenancy, are the capital or income as between these two interests? If they represent earnings made partly before and partly during the life-tenancy are they apportionable? The right to stock dividends as between tenant for life and remainderman, has not been considered by the court of last resort in this State. The decisions upon the subject in other States and in England are conflicting, and it will be the duty of this court, when occasion arises, to seek to settle the question upon principle, and establish a practical rule for the guid-

ance of trustees and others, which shall be just and equitable as between the beneficiaries of the two estates.

The surrogate decided that surplus income of the share of the testator's estate given to his daughter for life, which accrued during her minority, was not, by the true construction of the will, to be regarded as an accretion to the capital, but was income, payable to the tenant for life on her reaching her majority, and he also decided that stock dividends declared during the life-tenancy belong to the life-tenant and not to the remaindermen. It is obvious that the five sons of the testator, who, in the event which has happened, are entitled as remaindermen to the share given to his daughter for life, are interested in the determination of these questions. They were adjudicated by the surrogate in favor of the daughter's personal representative, in a proceeding between him and the executors exclusively, without bringing in three of the sons of the testator, or giving them an opportunity to be heard. The decrees require the executors and trustees to pay over the fund to the petitioner, and when executed, the fund will pass beyond the control of the court into his possession. "It is plain, we think, that if, instead of resorting to the Surrogate's Court, the petitioner had filed a bill in equity for the same relief, the court would not have proceeded to a decree in the case until all the parties interested in the questions, had by amendment or other appropriate proceeding, been brought in and made parties to the action. For it is a general rule of courts of equity that all persons materially interested in the object of the suit must be joined, so that there may be a complete and final determination of the controversy. (1 Dan. Ch. Pl. 190; Story's Eq. Pl. § 99.) There are exceptions to the rule, where its enforcement would cause great practical inconvenience, or where the interests of persons, not parties, are deemed to be protected by representation. Of the latter class is the case of a bill filed by a single creditor or legatee, against an executor or administrator, for the satisfaction of his single debt or legacy, without joining the other creditors or legatees, or the next of kin, although the allowance of the particular debt or legacy may diminish the fund in which they are inter-

ested. But if special facts exist, which render the actual joinder of all the persons interested proper, as where there is a deficiency of assets, the bill must make all the persons so interested parties, either as plaintiffs or defendants, or where their rights are identical or not inconsistent, it must be filed in behalf of the plaintiff and all others in the same relative situation. (Story's Eq. Pl. § 140; *Brown v. Ricketts*, 3 Johns. Ch. 553; *Hallett v. Hallett*, 2 Paige, 15; *Egberts v. Wood*, 3 Id. 517.) And in actions against trustees in respect to the trust property or for an accounting, and the administration of the trust estate, all the *cestuis que trust* or beneficiaries are necessary parties. (Story's Eq. Pl. § 207; *Holland v. Baker*, 3 Hare, 69; *Wakeman v. Grover*, 4 Paige, 23.) The principle that persons not actually parties to a suit in equity may nevertheless be bound by the decree, on the theory of representation, has, however, no proper application to a case like this. The personal representatives of the daughter and the sons of the testator, have a common interest in the accounting by the executors and trustees, and conflicting interest in the distribution. Their interest in the taking of the accounts is hostile to the executors and trustees and it will be a violation of equitable principles to permit executors having an adverse interest to represent parties not before the court. The interest, moreover, of the absent parties is not indirect and consequential, but immediate and direct.

The proceeding in question was not an action in equity, but a proceeding before a Surrogate's Court, a tribunal of peculiar and limited jurisdiction, which can exercise only the powers prescribed by the statute and such incidental powers as are requisite to the execution of the powers expressly given, or to the attainment of justice in the particular cases to which its jurisdiction extends. (*Sipperly v. Baucus*, 24 N. Y. 46; *Stilwell v. Carpenter*, 59 Id. 414; *Bevan v. Cooper*, 72 Id. 317.) Unless a warrant for the jurisdiction exercised by the surrogate in the case can be found in the statute, either expressly or by implication, the whole proceedings are void. By the general statute defining the powers of surrogates' courts, power is conferred upon surrogates among other things to

direct and control the conduct and settle the accounts of executors, and to enforce the payment of debts and legacies (2 R. S. 220, § 1), and the powers so conferred are to be exercised in the cases and in the manner prescribed by the statutes of the State. (Id.) By chapter 782, Laws of 1867, a new power was conferred to compel testamentary trustees to render accounts of their proceedings in the same manner as executors and administrators. On referring to the particular provisions of the statute regulating the subject of accounting by executors before the surrogate, it will be seen that two modes of accounting are provided for. One is had at the instance of a particular creditor or legatee, upon a citation served on the executor, which may be followed by a decree for the payment of the particular debt or legacy, of the party instituting the proceeding. (2 R. S. 92, § 52; Id. 116, § 18; *Guild v. Peck*, 11 Paige, 475.) The other is what is known as the rendering of a final account, which may be had at the instance of the executor, upon a citation requiring the creditors, legatees, and (in case of intestacy) the next of kin of the decedent, to appear and to attend the settlement of the account, which must be served on all persons to whom it is directed, or the accounting may be had upon the order of the surrogate, upon his own motion and without the application of an interested party. (2 R. S. 92, §§ 52, 60, 61; *Smith v. Lawrence*, 11 Paige, 206.) When the account shall be rendered and finally settled, the surrogate is authorized to make a decree for the payment and distribution of the estate remaining in the hands of the executors, to and among the creditors, legatees, widow and next of kin of the deceased according to their respective rights, and in such decree he shall (the statute declares) "settle and determine all questions concerning any debt, claim, legacy, bequest or distributive share, to whom the same shall be payable, and the sum to be paid to each person." (2 R. S. 95, § 71.) The proceeding in this case was a proceeding for a special accounting in the first mode referred to. The executors had never rendered an account, and it was not turned into a final accounting either upon their application or by the order of the surrogate. Such questions, therefore, only could be determined

by the surrogate, as were appropriate to the limited and special nature of the proceeding. The provision authorizing the surrogate to compel an accounting and the payment of a debt or legacy, upon the application of a particular creditor or legatee, cannot, we think, be construed as authorizing a decree of payment, except where the right to the debt or legacy is undisputed. Other legatees, or creditors, may incidentally be affected by a decree for the payment of a particular debt or legacy, as such payment would reduce the fund in the hands of the executors or administrators, but this interest is indirect and consequential, and they are bound upon the theory of representation. But when the proceeding is by a creditor to compel the payment of a debt, and the debt is not admitted, and is disputed, the surrogate has no power to adjudicate it. He must await the ascertainment of the debt, by judgment, or upon a reference in the manner pointed out by the statute. This was decided in *Tucker v. Tucker*, 4 Keyes, 136. This decision was based in part upon the special provision of the statute relating to disputed claims, and applies as well to a provisional as to a final accounting. The statute does not in terms preclude the surrogate from decreeing the payment of a disputed legacy upon the application of one party upon a provisional accounting when the other parties interested are not before him, but the inhibition is we think necessarily implied. When the surrogate, upon such an application, can see that other persons claim or may claim the same thing as the petitioner, and that a real question is presented as to the right of one of several persons to the legacy or fund, natural justice requires that he should not proceed to a determination without the presence of all the parties who may be affected by the adjudication. The statute provides for bringing in all the parties in interest on the final accounting, and in that proceeding jurisdiction is conferred to settle and adjust conflicting rights and interests, while no such authority is conferred in the special proceeding in favor of a single creditor or legatee, and such authority was not, we think, intended to be given. It is no sufficient answer that the absent parties will not be bound by the decree. The fund in the hands of the executor is a trust fund, and in

this case the fund in controversy was held under a formal trust. A court of equity would not permit it to be paid over without giving all the parties interested in the determination of the question, an opportunity to be heard. The surrogate cannot award it to one, and leave the others, who have not been summoned, to a doubtful remedy against the trustees, or to follow the fund into the hands of the personal representative of Mrs. Cragg.

The question of the jurisdiction of the surrogate to pass upon the construction of the will has been much argued in this case. In support of the objection to this jurisdiction, the case of *Bevan v. Cooper*, 72 N. Y. 317, is relied upon, in which the point decided was that a surrogate had no jurisdiction to determine the question whether certain legacies given by the will in that case, were charged upon real estate. The question was not, so far as appears, involved in the accounting, and was not necessary to be determined by the surrogate as incident to the accounting or distribution. The surrogate could not enforce the payment of the legacies out of the land, and as was said in the opinion, his decree adjudging the lien claimed would be *brutum fulmen*. It is doubtless true that a surrogate has no general jurisdiction in the construction of wills. But where the right to a legacy depends upon a question of construction, which must be determined before a decree for distribution can be made, the surrogate has, we think, jurisdiction under the broad grant of power conferred by section 71, upon a final accounting where all parties interested are before the court, to determine such construction as incident to the authority to make distribution. There are many cases in this court, on appeals from the decisions of surrogates on final accountings, which involved the interpretation and construction of wills, and no question was made by counsel, or suggested by the court, that the surrogate had no power to construe a will when necessary to the accounting and distribution. (*Stagg v. Jackson*, 1 N. Y. 206; *N. Y. Institution, etc. v. How's Ex'rs*, 10 Id. 84; *Parsons v. Lyman*, 20 Id. 103; *McNaughton v. McNaughton*, 34 Id. 201; *Bascom v. Albertson*, Id. 584; *Whitson v. Whitson*, 53 Id. 479; *Cushman v. Horton*, 59

Id. 149; *Hoppock v. Tucker*, Id. 202; *Teed v. Morton*, 60 Id. 502; *Lawrence v. Lindsay*, 68 Id. 108; *Luce v. Dunham*, 69 Id. 36; *Wheeler v. Ruthven*, 74 Id. 428; 30 Am. Rep. 315; *Ferrer v. Pyne*, 81 N. Y. 281.)

But for the reason that the jurisdiction of the surrogate is limited and special, and that he could not in the proceeding under review, determine the question as to the right to the fund in controversy, the judgment below should be reversed. We regret that this conclusion prevents a final disposition of this already protracted litigation.

Judgment of the general term and decree of the surrogate reversed.

All concur.

Judgment reversed.

ROOD vs. HOVEY.

[50 Michigan, 395.]

VESTING OF DEVISE TO CHILDREN "NOW LIVING."

Under a devise of a life estate to testator's widow, remainder to his children "now living, or who may be at the time of her decease," the estate vests in the children living at testator's death.

APPEAL from Lenawee.

Action to construe a will.

Bean & Underwood, for complainants.

Millard, Weaver & Weaver and *E. H. Rhoades*, for defendants appellants.

CAMPBELL, J. The controversy in this case turns on the question whether, under a will which created a life interest in lands, the remainder belonged to those children who were living at the death of the testator, or to those only who survived

the life tenant. Defendants are the widow and heirs of one of testator's children who survived him, but who died during the life tenancy referred to.

The will of Lansing Rood was executed February 14th, 1859, and he died the following April. All of the children living when the will was made survived him, and he had no posthumous children. He left a widow, Rhoby Rood, and five sons—Almond B., George R., Ralph M., Asher B., and Albert G. The widow lived until March 24, 1881, and never re-married. Almond B. died unmarried and without issue a few years after his father. Ralph Rood died in 1879, leaving a widow and child, who are defendants. The complainants are the other surviving sons.

The will in question, after disposing of the personal property, made the following disposition of the real estate :

"I do give and bequeath to my wife, Rhoby Rood, all my real estate, to be used and enjoyed by her as long as she shall remain my widow; and immediately after her decease or marriage, I give and bequeath to my son Asher B. Rood, one hundred dollars, to be paid him out of my real estate.

"I give and bequeath all the rest, residue, and remainder of my real and personal estate to my children now living, or who may be at the time of her decease or marriage, to be divided equally between them, share and share alike."

As there was no change in his family before his death there is no difficulty in determining who were meant by children "now living," and there was no child not then living. But two of the children then living afterwards died, and the question now raised is whether by their death their shares went to their heirs at law subject to the widow's tenure, or whether the estate in remainder was contingent and only finally vested in the three sons who survived the widow.

There can be no doubt that the policy of our statutes is to favor vested estates in preference to contingent, and that estates given to particular devisees shall always go to their heirs, unless a different purpose is apparent. The Legislature has endeavored in every possible way to prevent disinheritance of descendants unless required by the distinct purpose expressed by the testator. (Comp. L. §§ 4346, 4347, 4349.)

It is also well settled that, unless an intention appears to the contrary, the will shall operate from the death of the testator, and estates vest at that time. (*Toms v. Williams*, 41 Mich. 552; *Eberts v. Eberts*, 42 Mich. 404.)

It is a further rule that needs no authority, that clear language which conforms to the general beneficial policy of the law should not be strained for purposes which are unjust and unreasonable.

We do not think it proper to go into any extended discussion of testamentary law, because we have not been able to discover the least ambiguity in the language of this will. It says, as plainly as words can make it, that all of his children then living shall share in his estate not otherwise disposed of; that is, in all but the widow's interest. If there had been no other words no one could dispute that their interest was vested. The remaining words, "or who may be at the time of her decease," might very well apply to posthumous children, but the form of the expression is not such as to indicate an intent to qualify the former language as to living children. The charge on the estate in favor of his son Asher, who was no more likely to survive than the rest, is a slight indication in the same direction. There is nothing in the rest of the will favoring the idea that he had any purpose of disinheritng any of the offspring of his children. No amount of reasoning can throw much light on the meaning of the will. In our opinion the language used conforms to the general purposes of the law, and is best interpreted by the general rules before referred to. We think that Ralph Rood took a vested interest, and that defendants are entitled to succeed to it.

The decree below must be reversed and a decree rendered in favor of defendants, with costs of both courts.

The other justices concurred.

Meaning of the words "children" and "grandchildren."—The word "children," in the absence of anything to indicate a contrary intention on the part of the testator, has been generally held not to include grandchildren. *Cutter v. Doughty*, 28 Wend. 513; *Palmer v.*

Horn, 20 Hun, 70; Low v. Harmony, 72 N. Y. 408; Moon v. Stone, 19 Gratt. 130; Gable's Appeal, 40 Penn. St. 231; Castner's Appeal, 88 Id. 478; Walker v. Williamson, 25 Georgia, 549; Willis v. Jenkins, 30 Id. 167; Hopson v. Skip, 7 Bush, 647; Thomson v. Ludington, 104 Mass. 193; McGuire v. Westmoreland, 36 Ala. 594; Osgood v. Lovering, 33 Maine, 464.

The English cases sustain this rule. Crook v. Brookeing, 2 Vern. 106; Reeves v. Brymer, 4 Ves. 698; Radcliffe v. Buckley, 10 Id. 198; Powell v. Powell, 28 L. T. R. (N. S. 1873) 730; Carson v. Carson, 1 Phill. Eq. 57.

Neither does the word "grandchildren" include great-grandchildren. This is the rule alike in England and the United States. Earl of Oxford v. Churchill, 3 Ves. & B. 59; Loveday v. Hopkins, Amb. 273; Fenn v. Death, 28 Beav. 78; Yeates v. Gill, 9 B. Mon. 204; Pemberton v. Parke, 5 Binn. 601; Dooling v. Hobbs, 5 Harring. 405.

The word "children," on the contrary, is held to include grandchildren:

(a.) When there are no children.

(b.) When it appears to be the intention of the testator.

(c.) When the word appears to have been used as a word of limitation, equivalent to issue or descendants.

1. So held when there are no children. Crook v. Whitney, 7 D., M. & G. 496; Ewing v. Hoadley, 4 Litt. 349; Berry v. Berry, 9 W. R. 889.

2. Where it appears to be the intention of the testator. Houghton v. Kendall, 7 Allen, 72; Beebe v. Estabrook, 79 N. Y. 246; Prowatt v. Redman, 37 Id. 42; Long v. Labor, 8 Penn. St. 231; Sorver v. Berndt, 10 Id. 218; Hughes v. Hughes, 12 B. Mon. 121; Utz's Estate, 43 Cal. 201; Church v. Tyacke, 28 W. R. 91; Lord Woodhouslee v. Dalrymple, 2 Met. 419; Gill v. Shelley, 2 R. & My. 336.

3. Where the word appears to have been used or equivalent to "issue" or "descendant." *In re* Gawhall's Trusts, 8 D., M. & G. 480; Doe d. Jones v. Davies, 4 B. & Ad. 43; Raggett v. Beaty, 2 M. & Pay. 512; s. c. 5 Bing. 243; Beacroft v. Strawn, 67 Illinois, 28; Guthrie's Appeal, 37 Penn. St. 9; Vansant v. Morris, 25 Ala. 235; Fairchild v. Crane, 2 Beas. 105; Moran v. Dillehoy, 8 Bush, 434; Lockland v. Downing, 11 B. Mon. 32; Haldeman v. Haldeman, 40 Penn. St. 29; Yarnall's Appeal, 70 Id. 335; Edwards v. Bibb, 43 Ala. 666.

The word "children" will include children by different marriages. Carroll v. Carroll, 20 Texas, 731; *Ex parte* Ilchester, 7 Ves. 368; Isaac v. Hughes, L. R. 9 Eq. 191.

The word "grandchildren" has been held not to include a grandson's widow. Hussey v. Berkeley, 2 Ed. 194.

Neither does the word "children" include step-children. *Re* Hallett, 3 Paige's Ch. 375; Fouke v. Kemp, 5 Harr. & J. 135; Sydnor v. Palmer, 29 Wisconsin, 226.

Nor does it include an adopted child. *Schafer v. Even*, 54 Penn. St. 304.

If the word "children" is extended beyond its strict primary meaning it has been held in England then to include issue of every degree. *Pride v. Took*, 8 De G. & J. 275; *Crooks v. Whitley*, 7 D., M. & G. 496.

The word "children" means legitimate children, to the exclusion of illegitimate children, as a rule. *Bennett v. Cave*, 18 La. Ann. 590; *Collins v. Hoxie*, 9 Paige, 81; *Hughes v. Knowlton*, 37 Conn. 429; *Dane v. Walker*, 109 Mass. 179; *Stewart v. Stewart*, 4 Stew. (N. J.) 399; *Powers v. McEachern*, 7 S. C. 290; *Gelston v. Shields*, 16 Hun, 143.

CROCKER vs. DILLON.

[188 Massachusetts, 91.]

SAME PERSON EXECUTOR AND TRUSTEE.—IN WHAT CAPACITY FUNDS HELD.—CONVERSION OF TRUST PROPERTY BY BENEFICIARY.

Where an executor is also trustee under a will, to impose on him liability in the latter capacity there must be some authoritative and notorious act on his part showing a transfer of property from himself in one capacity to himself in another, such as the filing and settlement of his account as executor, crediting himself with funds as held by him as trustee.

If a *cestui que trust* fraudulently obtains from his trustee property forming part of the principal of the trust fund and converts it to his own use, a successor to the trustee may retain out of the income afterwards accruing to the beneficiary, the amount so converted.

BILL in equity by Uriel H. Crocker, appointed trustee under the will of James Dillon, and administrator *de bonis non*, with the will annexed, of said testator, in place of one Rand, against James Dillon and others, to obtain the instructions of the court.

In the court below a decree was entered that the bequests for the benefit of Mary E. Brigham, Perry Brigham and Salome M. Haven had been paid in full; that plaintiff should

withheld the sum of \$2,505 from the income of James Dillon ; and that one-half of the net income of the residuary trust fund should be paid to Minnie M. Dillon, and one-quarter to Edward S. Dillon and James Dillon, respectively.

H. W. Chaplin, for plaintiff.

M. Storey, for Mary E. Brigham, Perry Brigham and Salome M. Haven.

W. W. Vaughan, for James Dillon.

H. H. Sprague, for Edward S. Dillon and Minnie M. Dillon.

ENDICOTT, J. Two questions are now presented in this case : First, whether the three legacies named in the will of James Dillon to one Rand and John Dillon, as trustees for Mary E. Brigham, Perry Brigham, and Salome M. Haven respectively, have been paid to the trustees by Rand, as executor. Second, whether from the income of James Dillon, who is one of the *cestuis que trust* under the residuary clause of the will, the plaintiff, as trustee, can withhold the amount of \$2,505 which James Dillon has converted to his own use from the principal of the trust fund.

James Dillon died in 1872, leaving a will in which Rand was named executor, and by the terms of the will he was exempted from giving sureties on his bond. The will was admitted to probate in June, 1872. Rand accepted the trust, and gave bond without sureties. By this will the testator gave legacies to his two sisters of \$5,000 each ; and \$15,000 in trust to Rand and John Dillon, to pay the income for life to Mary E. Brigham, the principal at her decease to fall into the residue. He also gave to them \$5,000 in trust, the income to be paid to Perry Brigham, until he attained the age of twenty-one years, the principal then to be paid to him, but in case of his death before twenty-one to fall into the residue ; and a like sum was given to them upon a similar trust in favor of Salome M.

Haven. The residue of the estate was to be divided into six equal parts. One sixth to be paid absolutely to each of his two sons, James and Edward S. Dillon, and the remaining four sixths to Rand and John Dillon, in trust, the income thereof to be paid over in equal parts to his three children, James Dillon, Edward S. Dillon, and Minnie M. Dillon, during their lives respectively. And provision was made for the distribution of the principal on the death of each beneficiary.

The will evidently contemplates that one trustee might act, as it gives full power to both trustees, or to the survivor, to deal with the trust estate. John Dillon was never appointed trustee, and his resignation of the trust was filed in the Probate Court, and was accepted on June 7, 1875. Rand was not appointed trustee until June 14, 1875, when he gave bond without sureties under the St. of 1873, c. 122, and received a certificate of appointment from the Probate Court. On the same day that he was thus appointed sole trustee, his first account as executor, filed some time after January, 1875, was allowed in the Probate Court, at the request of James Dillon, Edward S. Dillon and Minnie M. Dillon, without further notice. This account contained no later date than January 7, 1875, and in it Rand credits himself, as executor, with \$15,000 paid to the trustees of Mary E. Brigham, with \$5,000 paid to the trustees of Perry Brigham, and with \$5,000 paid to the trustees of Salome M. Haven. It is to be remembered that, simultaneously with the allowance of this account, Rand was appointed sole trustee. Previously to June 14, and on that day, Rand had sufficient personal estate in his hands to pay these sums.

Three other accounts, entitled "trustees' first account," signed by Rand and John Dillon, as trustees for the benefit of Mary E. Brigham, Perry Brigham and Salome M. Haven, were allowed by the Probate Court on June 14, with the written assent of the several *cestuis que trust*. These accounts contained items of income paid over to the several *cestuis que trust*, as received from the executor from time to time prior to January, 1875. The payments were made by Rand alone, John Dillon having taken no active part in the management of

the trust before he declined the office. Rand, as executor, was not bound to pay over these items to himself and Dillon as trustees; but, as these items would be received for the benefit of the beneficiaries, subject only to the contingency that the estate might prove insolvent, the executor might safely advance these amounts, the trustees being liable to return the same, if required by the executor for the payment of debts. But this contingency did not arise, for the estate at that time was perfectly solvent. This course pursued by Rand was in conformity with the decision in *Minot v. Amory*, 2 Cush. 377. These accounts, therefore, simply show payment to the trustees before their formal appointment, and before the transfer to them, or the survivor of them, of the principal of the trust funds; and it was proper that they should contain the statement, that no other payments had been made to Dillon and Rand as joint trustees. This statement cannot be regarded as contradictory to the statement in Rand's first account as executor, that he had paid over the several sums due to the trustees of Mary E. Brigham, Perry Brigham and Salome M. Haven, for that fact could not appear until Rand had, by an account, discharged himself as executor, by transferring the funds to himself as trustee. (*Conkey v. Dickinson*, 13 Met. 51.) Rand, in his account as executor, credits himself with the several payments made in these so-called trustees' accounts.

A second and final account by Rand, as executor, was allowed in the Probate Court, in March, 1877, showing his disbursements of all the assets in his hands as executor when the first account was rendered, in which he credits himself with \$7,964 32 paid to the trustees under the will of James Dillon; and, on the same day, the Probate Court allowed a first and second account of Rand, as sole trustee, under the residuary clause of the will, for the benefit of James Dillon, Edward S. Dillon and Minnie M. Dillon, in which he charges himself with this sum of \$7,964 32. He filed no accounts as trustee for the Brighams and Salome M. Haven.

It appears by these accounts that Rand had settled the estate, and accounted for all the personal property in his hands as executor, and had paid over to the several trusts of which

he was the trustee the several sums to which they were entitled.

In April, 1877, he fled from the Commonwealth, and soon after from the United States, having apparently squandered or appropriated to his own use the great bulk of the funds which by his several accounts he held as trustee. Before he left the United States, and while in New Jersey, James Dillon, one of the beneficiaries under the residuary clause, who held a power of attorney from Rand, as trustee, to manage the trust estate and make payments on account of it, obtained from him a transfer, as executor, of one hundred and fifty-five shares of the stock of the Boston Wharf Company, which was known by Dillon to be part of the principal of the trust estate held by Rand. By pledging this stock Dillon raised \$4,928; a portion of this he paid to Mary E. Brigham as the income of the trust in her favor, a portion to the account of Edward S. Dillon and Minnie M. Dillon, and the balance of \$2,505 he retained himself. In May, 1876, Dillon also obtained from Rand a transfer of twenty shares of stock in the Old Colony Railroad Company, which stood in Rand's name as executor. Dillon sold these shares and appropriated the proceeds to his own use.

The only personal property of any present value which the plaintiff—who, after Rand's removal, was appointed trustee under the will, and also administrator with the will annexed—has been enabled to obtain as trustee, is nine shares in the Atlantic National Bank. The plaintiff has also received the rents of certain real estate, which is described in an indenture made June 4, 1875, by Rand, as executor, and James Dillon and Edward S. Dillon, containing a release of James Dillon and Edward S. Dillon to Rand and John Dillon, as trustees, and also containing a release by Rand, as executor, to James and Edward S. Dillon of certain other real estate. This division embraced all the real estate remaining unsold.

After his appointment the plaintiff received, among other papers left by Rand, a note of Rand to himself, as trustee, for \$7,964, being the same amount he had charged himself with as trustee for the Dillons, two notes of \$5,000 each, signed by him, payable to himself as trustee for Perry Brigham and Sa-

lome M. Haven respectively, and a note of \$1,690. On all these notes, which were dated January 1, 1875, interest was indorsed to January 1, 1877. There was also a note of James Dillon to Rand, as trustee, for a small amount. These notes were admitted by the master, but not on the question of the payment of the trust fund to the trustee. They were competent as showing Rand's management of the trust estate. The master finds that all the notes were made after September, 1875. There was no note to himself, as trustee, for Mary E. Brigham.

There was also put in evidence, before the master, accounts of the Brigham and Haven trust funds entered by Rand in an account-book during his trusteeship. They purported to show receipts, January 1, 1875, by Rand, trustee, of the amounts of those funds. On the account with Mary E. Brigham were entered various dividends on shares of stock in the Atlantic National Bank, the Boston Wharf Company and the Old Colony Railroad Company, together with interest on the note of \$1,690. Evidence was introduced before the master bearing on the time when the entries were made, but the master merely finds that they were made by Rand while trustee. It does not appear in the master's report, nor was it contended in the argument, that Rand did not in fact pay income to the Brighams and Haven, while he was trustee, under his appointment as such, though he never filed an account to that effect.

This statement shows great irregularity and criminal misconduct on the part of Rand, in the management of the trusts assumed by him under the will. For, as it is expressly agreed, that on June 14, 1875, when Rand's first account as executor was allowed, he had in his hands enough personal estate to pay the specific bequests in trust for the benefit of the Brighams and Salome M. Haven, it must be assumed that his defalcations occurred after that time. And the question is whether the loss is to fall upon the trusts created in their favor, or upon the legatees under the residuary clause.

There are two important findings of the master, so far as the first question to be decided is concerned. 1. "I find that, by rendering said accounts as executor and trustee, Rand be-

came and was chargeable, as trustee under the will, with personal property to the amount of \$7,964 32 held for James, Edward S. and Minnie M. Dillon, with personal property to the amount of \$15,000 held for Mary E. Brigham, with personal property to the amount of \$5,000 held for Perry Brigham, and with personal property held for Salome M. Haven to the amount of \$5,000. I find, on the evidence of said accounts, that personal property to the amount of the three sums last named was transferred to the trust on or prior to the fourteenth day of June, 1875." 2. "I find that the stocks mentioned were not specifically appropriated to either of the trust funds." The second finding refers to the shares of stock on which dividends had been paid to Mary E. Brigham, some of which shares are now in the hands of the plaintiff; and it is only of importance in that it excludes her from contending that these shares form a part of the trust fund for her benefit.

It is true, as contended by the counsel for the Brighams and Haven, that nothing but the payment of legacies can discharge the claim of the legatees upon the testator's estate. And where the bequests are given in trust, and the executor and the trustee named in the will are different persons, it must appear that there was a specific and absolute transfer of the trust fund by the executor to a trustee duly qualified to receive it. But where the same person is named both as executor and trustee under a will, and the same hand is to pay and receive the money, there can be no evidence of the actual transfer of the property from himself in one capacity to himself in another, except from some declaration or authoritative and notorious act on his part showing a change in the manner in which the property is held. And an executor who is also trustee under a will cannot be considered as holding any part of the assets in the latter capacity until he has settled an account in the Probate Court as executor, in which he is credited as executor with the amount which he holds as trustee; and such account should not be allowed by the judge of probate, without first requiring him to give bond for the faithful perform-

ance of his duties as trustee. (*Hall v. Cushing*, 9 Pick. 395, 409.)

In *Conkey v. Dickinson*, 13 Met. 51, 54, it was said by Mr. Justice Wilde, in citing *Hall v. Cushing*, "that case, it is true, did not necessarily require a decision on that point; but it was supposed that it would become important on a hearing in chancery, and it was therefore argued by counsel, and the question was decided after full deliberation; and we see no cause to doubt the correctness of the decision."

But it is contended, that a payment by the executor to himself as trustee can only be established by filing both an executor's account showing payment to the trustee, and a trustee's account showing the receipt of the payment. We are not aware of any case in this Commonwealth where that has been expressly decided to be necessary, and the cases cited by counsel do not sustain the proposition. A sworn account, allowed in the Probate Court, in which the executor credits himself with the amount of such a bequest as a payment to the trustee under the will, he being the trustee named therein, and his appointment at the same time as trustee, and his giving the bond required by law for the faithful performance of his duties as such, would certainly seem to discharge him as executor, and vest the trust fund in him as trustee. His obligation to file an inventory or an account is a duty imposed upon him by his bond, and it cannot be that his failure or neglect to perform such duty as trustee, in regard to the trust fund, can render him still liable only as executor and not as trustee. It would be a breach of his bond as trustee and not of his bond as executor.

In *Hall v. Cushing*, *ubi supra*, a testator left his personal property to his children, and directed his executors to invest it and hold it for their education and maintenance, and to divide the principal among them as they became entitled to it respectively under the terms of the will. The action was on the bond of one of the executors, and the alleged breach was that the executor received and held in his hands, while executor, and during the minority of the children, a large amount of personal property, after the payment of all debts and charges

in settling the estate, and refused to dispose of and invest it according to the directions of the will. It was held that the action could be maintained, as the executor had neglected his official duty. It was contended by the defendants that a transmutation of the property was effected by operation of law to the executor as trustee, and his duties as executor ceased, and the sureties on his executor's bond were not liable. But Mr. Justice Wilde said: "Before there could be any transmutation of property, as contended for by the defendants' counsel, the executor must have settled his final account of administration in the Court of Probate, in which the balance due from him as executor should be allowed to his credit, as being retained by him in his capacity as trustee for the minor children. And such an allowance would not, it is to be presumed, be made by the judge of probate, without first requiring him to give bond for the faithful performance of his duties as trustee."

This case is affirmed in *Conkey v. Dickinson*, 13 Met. 51, which holds that, where the same person is both an executor and a guardian, he is not chargeable, as guardian, with the amount of a legacy left to his ward, until he credits himself with it in his account as executor as paid to himself as guardian, and this account is allowed by the Probate Court; and that the fact that he charges himself with the legacy in an account prepared by him as guardian, but not presented to the Probate Court, is immaterial.

In *Newcomb v. Williams*, 9 Met. 525, the action was on an executor's bond. Two persons were appointed executors. The testator gave all his property to certain nephews, subject to the payment of his debts, and provided that Russell, one of the executors, should be trustee to hold the same upon certain trusts, and in the manner directed by the will. The executors rendered an account of their administration, showing a balance for which they were accountable, and which was retained in the sole possession of Russell, who was named trustee in the will. No other account was rendered by both executors, but Russell rendered a further account, and the Probate Court ordered that he should pay the balance thereof to the nephews, as directed by the will, but he failed to do so. He had not

been appointed or given bond as trustee, and had not assumed or elected to act in that capacity, and the accounts did not show that the balance had been paid to him as trustee. It was held that the taking of the money by Russell under these circumstances did not discharge the executors, although Russell was named sole trustee; and that the action could be maintained on their bond.

In *Elliott v. Sparrell*, 114 Mass. 404, which was an action of contract to recover interest upon a legacy, the following facts appeared: Joshua Magoun died in 1857, leaving a will, in which he gave to his granddaughter a legacy of \$500, to be paid to her by his executors when she should arrive at the age of twenty-one years, and made further provision as to its distribution in case of her death before reaching that age, and also this provision: "The said five hundred dollars bequeathed to my granddaughter Lucy C. Elliott, I direct to be taken from my personal estate, before making a division of the same, and invested by my executors for the especial purpose of paying the above-named legacy." John Sparrell and James W. Magoun were duly appointed executors. Lucy C. Elliott, the plaintiff, became of the age of twenty-one years on October 10, 1872, and soon after demanded of the executors the legacy, and the income and interest thereof. James W. Magoun paid her \$500, with interest thereon from October 10, 1872; both he and Sparrell refused to pay income or interest thereon accruing prior to October 10, 1872. The executors filed separate accounts. In the account of Sparrell, allowed April 12, 1859, this payment appears: "To legacy to T. J. Elliott's daughter, \$500;" and in Magoun's account, allowed February 8, 1859, this receipt appears: "February 4, 1858. Cash of John Sparrell, \$500." In Magoun's account, allowed May 8, 1860, was the following item of payment: "By cash in his hands reserved for the payment of legacy given by the will of the deceased to be paid Lucy C. Elliott on her arriving at the age of twenty-one years, \$500." It was held that it was the clear meaning of the will that the \$500 should be separated from the rest of the estate and invested so as to bear interest, and the accumulation would belong to the legatee and be-

came part of the legacy to be paid her at twenty-one. And it was said: "The only question, therefore, is whether the sum of \$500 was taken from the other personal estate by the executors, as directed, and set apart as the legacy to the plaintiff. On this point we think the accounts of the executors are decisive that it was." "It has been so held by the executor, separate from the other personal property, as the legacy of the plaintiff; and this appears in the most authoritative form in which the act of an executor can be established, by his sworn account in the Probate Court." "It is an 'authoritative and notorious act,' showing a change in the manner in which the property was held, as mentioned in *Newcomb v. Williams*, 9 Met. 525, 534."

So, upon the facts of the case before us, there were authoritative and notorious acts of Rand showing a change of the property from himself as executor to himself as trustee, and we are of opinion, therefore, that the bequests for the benefit of Mary E. Brigham, Perry Brigham and Salome M. Haven have been paid. If there had been sureties on Rand's bonds, we cannot doubt that the sureties on the executor's bond would have been discharged, and those on his bond as trustee held for his defalcation.

The only other question properly presented to us upon this record is whether the plaintiff, as trustee, in accounting with James Dillon, who is one of the *cestuis que trust*, can withhold from his share of the income the amount of \$2,505, which he has converted to his own use from the principal of the trust fund. The master has found, upon evidence which in our opinion justifies the finding, that James Dillon appropriated the said sum to his own use, knowing the state of the trust estate and that the same was the proceeds of property held as a part of the principal of the trust estate. It is clear that, upon principles of equity, and in justice to the other *cestuis que trust*, the plaintiff ought to be allowed to retain out of the income coming to James Dillon the amount which he has fraudulently abstracted from the trust fund.

The defendant, James Dillon, contends that the plaintiff is not entitled to the relief which he asks against him, because he

has a plain, adequate and complete remedy at law. But it is too late to take this objection, after answering and submitting to the jurisdiction of the court, and taking his chances of a hearing upon the merits. (*Dearth v. Hide & Leather National Bank*, 100 Mass. 540; *Page v. Young*, 106 Mass. 313; *Jones v. Keen*, 115 Mass. 170.) So the objection that the bill is multifarious should have been taken by demurrer, and is waived by the defendant by going to a hearing upon the merits. (1 Dan. Ch. 346; Story's Eq. Pl. § 284; *Oliver v. Piatt*, 3 How. 333.)

The result is, that the presiding justice who heard the case rightly overruled the exceptions to the master's report, and the decree entered by him should be affirmed.

Decree affirmed.

KELLEHER vs. KERNAN.

[60 Maryland, 440.]

WILL IN ANTICIPATION OF JOURNEY NOT CONDITIONAL.—EVIDENCE OF ATTEMPTS TO PROVIDE FOR DEVISEE BEFORE TRIP.

An instrument executed by deceased, commencing "In anticipation of my departure from the city of Baltimore, and to provide for possible contingencies," and bargaining and selling to his daughter all his goods, chattels and effects, reserving the use of the same and right to dispose of the same otherwise, may be probated as a will, although deceased returned safely from the contemplated trip.

Proof of testator's purpose and efforts to provide for his daughter in anticipation of his death is admissible to show a testamentary condition of mind.

APPEAL from the Orphans' Court of Baltimore county.
The opinion states the case.

James A. L. McClure and *William Pinkney Whyte*, for appellant.

John P. Poe, for appellees.

IRVING, J. The question for determination in this case is whether the Orphans' Court for Baltimore city erred in refusing probate to the following paper which was propounded as the last will and testament of Owen Kernan :

"BALTIMORE, July 20th, 1882.

"In anticipation of my departure from the city of Baltimore, and to provide for possible contingencies, I hereby give, bargain and sell and transfer unto my daughter, Ann C. Kelleher, her personal representatives and assigns, all my machinery, horses, wagons, goods, chattels and effects which I now have, or may hereafter acquire, or possess, and all moneys, claims and demands to which I am or may be hereafter entitled, reserving to myself the use of the same, and the right to dispose of the same otherwise if I deem proper. Witness my hand and seal this twentieth day of July, 1882.

his

"OWEN + KERNAN. [SEAL.]

mark

"Witness : James McColgan."

The maker was an old man, nearly eighty years old. He made the expected trip, returned safely, and died shortly afterwards. In *Masterman v. Moberly*, 4 Eng. Ecclesiastical Reports, 108, it is stated to be the "settled law that if the paper contains the disposition of the property to be made after death, though it were meant to operate as a settlement, or a deed of gift, or a bond ; though such paper were not intended to be a will, nor other testamentary instrument, but an instrument in different shape ; yet if it cannot operate in the latter, it may nevertheless operate in the former character." Courts do this to carry out the intention of the maker, who, having attempted to make disposition of his property after his death, in a particular way, and by an instrument not called a will, but which will not effect the maker's purpose, except as a will, dies without making any other disposition of it. If the disposition necessarily takes effect after death, and the intention is clear, that will be held to be a will which the maker supposed to be some other kind of paper. In such case it must appear certain-

ly what the testator wanted to do, and that he thought he was effectually accomplishing it by the paper made, in order to justify the holding an instrument to be testamentary which was executed as and for something else; but if it so appears, many adjudged cases establish the law to be as stated. *Habergham v. Vincent*, 2 Ves. Jr. 231, is a leading case on the subject. In that case Justice Buller replying, in his opinion, to the argument that the maker did not intend to make a will, said, "whether the testator would have called this a deed or a will is one question; whether it shall operate as a deed or a will is a distinct question that is to be governed by the provisions in the instrument. A deed must take place on its execution or not at all. It is not necessary to convey an immediate interest in possession, but it must take place as passing that interest to be conveyed at the execution; but a will is quite the reverse; it can only operate after death."

In *Carey et al. v. Dennis and Wife*, 13 Md. 17, this court not only adopted the law as laid down by the Chancellor, and Justices Wilson and Buller, who sat with him in *Habergham v. Vincent*, but also Justice Buller's language; and held certain bonds for the payment of money by the maker (professing to be executed for value received, and drawing interest from date; which were not delivered to the obligees, but to another to be delivered to the obligees after the maker's death) to be testamentary papers. This court says in that case that the rule is, that "when an instrument does not operate *inter vivos*, but is made to depend for its whole operation upon the death of the maker to consummate it, then it can only take effect as testamentary." We refer to a few of the cases which support this doctrine. (*Cross v. Cross*, 55 E. C. L. 714; *Cock v. Cooke*, L. R. 1 P. & D. 241. In *Rehn v. Coles*, L. R. 2 P. & D. 362; *Att'y Gen'l. v. Jones et al.* 3 Price, 369; *Jackson v. Jackson's Adm'r*, 6 Dana, 257; *Morrill v. Dickey*, 1 Johns. Chan. 153; *Watkins et al. v. Dean et al.* 10 Yerger, 321; *Walker v. Jones*, 23 Ala. 448; *McGee v. McCants*, 1 McCord, 517; *Webburn v. Weaver et al.* 17 Ga. 267; *Johnson, Adm'r v. Yancey et al.* 20 Ga. 707; *Turner et al. v. Scott*, 51 Pa. St. 126; *Daniel v. Hill*, 52 Ala. 430; *McBride et al. v. McBride et al.* 26

Grattan, 480.) In the last mentioned case Judge Staples concisely states the law thus: "All the authorities hold, indeed it is very clear, it is not necessary to the validity of a will, that it should have a testamentary form, or that the decedent should know he had performed a testamentary act, or that he should intend to perform such act. A deed poll, or an indenture, a bond, a marriage settlement, a letter, a promissory note and the like have been held valid as a will." To prevent misapprehension it is proper that we add, that while it may not be necessary for the maker to know what he is doing is, in fact, a will, or should intend it to be technically such, yet it is indispensably necessary to holding it to be a will, that he should have the will or mind to do that which the paper made seeks to do, and to do it then and by that paper. He must have that which is called the *animus testandi*, although he need not have the purpose to make a will in form, if he is found to have the intention to do, by the paper made, that which a will only can effect. As we read this paper propounded for probate, we are unable to see that it has any effect whatever, unless it be regarded as a will. It disposes of *personal property* only. It takes the form of a deed of gift, or bargain and sale, without any consideration, and without formal acknowledgment before a justice of the peace. It does not give to the appellant any present interest or title to the property enumerated in it. If it had only reserved a life estate to the maker, a present right to be enjoyed *in futuro* would have passed, and the paper then could not have been regarded as testamentary. Had the testator, in addition to the reserved use to himself for life, added a simple power of revocation in a particular way, as was done in *Wall v. Wall*, 30 Miss. 91, that case would have been an authority to sustain us, if we held the paper in such case to be presently operative. But instead of doing so, the dominion, the absolute ownership, is reserved. He does not reserve the right of revoking that instrument, but the right of doing anything he pleases with any part of the property. The intended assignee therefore took no interest under the paper, present or prospective, except such as was contingent wholly on the maker's death. His death being

necessary to the vesting of any right in her, it was ambulatory entirely, and if it is anything it is a will. It begins with announcing an intended trip away from home, and states that it is made to provide for possible contingencies. Contemplation on the trip brought the reflection that possible contingencies required him to make certain intended provision for his daughter, and not to postpone longer. Possible death before his return was what he clearly meant, and that possibility induced him to provide at once for such contingency.

It is possible he may have thought the paper some kind of a valid instrument different from and other than a will; yet the intention was clear to provide for his daughter in the event of his death; and he intended that paper to carry the property to her in such event. The case of *Walker v. Jones*, 23 Ala. 448, is a case like this in the fact that there was no delivery of the property conveyed by the deed, and not only the use was reserved during life, but the absolute right to exercise ownership over it was reserved. The instrument in that case was in the form of a deed, in the language of one, and was acknowledged *as one* before a justice of the peace; but it was held to be a will. The fact, in the present case, that the maker was about taking a trip away induced him to make the paper then; but because he states his reason, viz., that it was in anticipation of the trip that he makes the provision against "possible contingencies," does not warrant us in holding that the will was wholly contingent in respect to its operation, and that because he did not die during that trip, but returned and died afterwards at home, leaving this paper uncanceled, it can have no operation. From the moment he executed the paper he must have intended it to operate if he died afterwards and before starting away. It could not have had reference to death occurring *only* during that absence. In reserving a life estate to himself he must have contemplated something more than the period of his absence, during which he could not and would not use the property. He was not content with reserving the life estate. He reserves the right to dispose of it in any way he chooses. Evidently he was counting on the chances of a safe return and possible desire to sell or otherwise turn the property to account

and profit. Clearly he intended that paper to express his purposes respecting the property covered by it; and to control its disposition in the event he should die without making some change or other provision. He intended it as an effective provision if he did nothing else. The trip might result fatally to him. Hence the incentive to do then what he did do, and what he had hitherto neglected. He states the inducement to action without intending to give it the effect of making the paper contingent. This view is sustained by adjudged cases which, in some instances, in expression, are singularly analogous. In the *Goods of Dobson*, L. R. 1 P. & D. 88, the will reads thus: "In case any fatal accident happening to me, being about to travel by railway, I hereby leave," etc. This was held not to be contingent upon the event of the testator's death on the journey he was about to take when the will was executed. In the *Goods of Martin*, reported in same book, page 380, the testator says: "Being physically weak in health, I have obtained permission to cease from all duty for a few days, and I wish, during such time, to be removed from the brig *Appellina* to the floating hospital ship *Berwick Walls*, in order to recruit my health; and in the event of my death occurring during such time, I do hereby will," etc. It was in proof that he recovered from the illness and afterwards frequently expressed the desire that all his available property should go to a certain orphan asylum. Sir J. P. Wilde held the will not to be contingent or conditional and awarded it probate.

In *French v. French*, 14 W. Va. 459, the will was in these words: "Let all men know hereby, if I get drowned this morning, March 7, 1882, that I bequeath all my property, personal and real, to my beloved wife, Florence. Witness my hand and seal." Judges Haymond, Johnson and More concurred in holding this will not to be conditional upon his being drowned that day. The paper was given to his wife when he started. He returned safely and died afterwards, leaving that paper still in his wife's possession, which was, by the decision of a majority of the Appellate Court, sustained as a valid unconditional will. Without committing ourselves to full approval of these several decisions under their respective circumstances

and language employed, we refer to them as vastly stronger cases for holding the will contingent than this one, and where they were held not contingent. In the case under consideration it would seem as if allusion was made to the projected trip and the attendant contingencies which might occur, only as the inducement for his making the paper, which evidently embodied what he wanted, in any event, to be done with his property. It is almost like the case of *Tarver v. Tarver et al.* 9 Peters, 174, where the testator prefaces his disposition by saying: "Being about to take a long journey, and knowing the uncertainty of life, he deemed it advisable to make a will," which will was held not to be contingent. In the *Goods of Thorne*, 4 Swabey & Tristram, a will, in which the testator says: "I request that in the event of my death whilst serving in this horrid climate, or any accident happening to me," etc., was held not to be conditional. If the wills we have referred to were not conditional ones, certainly we ought not to hold this one to be so. The whole justification for holding any paper not made as a will, to be the will of the maker, is the furtherance of the testator's wishes. To hold this paper a will, and yet conditional, would certainly not be in accordance with his purpose.

Whether an instrument is to be considered as a will depends on the intention of the maker; and the intention expressed in the will must govern its construction. (1 Jarman [R. & T.'s edition], 33, notes.) If the intention is not clearly and satisfactorily expressed, and the paper is not a will in form, but in the form of some other instrument making disposition of property only after the owner's death, then parol evidence may be resorted to for aid in getting at the intention. But the general rule is that the intention must be gathered from the contents of the whole instrument. (*McGee v. McCants*, 1 McCord, 517, and 1 Jarman, 34; *Wareham v. Sellers*, 9 G. & J. 98.) Evidence of the circumstances surrounding the testator when he made the will are admissible of course; and such evidence is admissible for the purpose of ascertaining whether the testator, at the time of making the paper, had a purpose to direct the posthumous destination of his property. But when

the conclusion is reached that the paper should be regarded as a will, parol evidence cannot be resorted to for the purpose of construction, except where there is latent ambiguity. (1 Jarman [R. & T.'s edition], 726, 727, and notes.) "The language must be interpreted according to its proper acceptation with as near an approach to that acceptation as the context of the instrument and the state of circumstances existing at time of its execution will admit of." We regard the proof respecting the testator's purpose and efforts to provide for his daughter in anticipation of his trip as properly received, for the purpose of determining whether that condition of mind which the law regards as testamentary, existed. Beyond that we have disregarded it, and rely wholly on the paper itself in deciding whether it was contingent.

It follows, from what we have said, that the Orphans' Court erred, and the paper propounded should have been admitted to probate.

Reversed and remanded.

See *Castor v. Jones*, *ante*, p. 148; *Armstrong v. Armstrong*, 1 Am. Prob. R. 206, and cases in note; *Cowley v. Knapp*, *Id.* 390.

STEVENSON *vs.* SUPERIOR COURT.

[62 California, 60.]

ADMINISTRATION ON ESTATE OF LIVING PERSON.

Administration upon the estate of a living person is void, and will be set aside upon the application of the supposed decedent, although the estate has been settled and the administrator discharged.

APPLICATION for a writ of certiorari to review action of Superior Court in setting aside administration proceedings upon the estate of James Valentine.

The administrator was discharged December 24, 1877. On February 11, 1881, Valentine filed his petition to annul the proceedings, and thereafter recovered judgment.

L. E. Pratt and Wright & Wright, for plaintiff.

L. Quint, for defendant.

Ross, J. The question in this case is whether the court in which was had administration upon the estate of a man supposed to have been dead, but who subsequently and after the administration had been closed appeared "in the flesh," and moved the entry of an order vacating and annulling the proceedings, rightly granted the motion and entered the order. We have no doubt of the correctness of the action of the court in that particular.

Administration may lawfully be had upon the estate of a dead man, but not upon that of one in life. Until death occurs there is no "subject-matter" over which it is possible for any court to exercise jurisdiction. It is true that the Court of Probate, before issuing letters of administration, must first determine affirmatively the question of death. But notwithstanding such determination the fact that the supposed intestate is alive may still be shown, and when shown, establishes the nullity of the entire proceedings. The authorities in support of this proposition are numerous. (Sec. 1, Williams on Executors, American notes by Perkins to page 632, and notes to page 631; Vol. vii, Robinson's Prac. p. 324; *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87; *Fisk v. Norvel*, 9 Texas, 12; *Duncan v. Stewart*, 25 Ala. 408; *Allen v. Dundas*, 3 T. R. 125.)

In *Griffith v. Frazier*, 8 Cranch, 23, Chief Justice Marshall said: "Suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary, that the person on whose estate he acts is dead, if the facts be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not within his jurisdiction. It was not one in

which he had a right to deliberate. It was not committed to him by the law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction."

In *Beckett v. Selover*, 7 Cal. 226, 227, this court said that the fact of death and the place of residence of the deceased at the time of death must be alleged in the petition for letters, and must be true in point of fact, "and when they do not both exist in point of fact the proceedings are utterly void and not voidable." Further on, the court said: "It is apprehended that no one would insist that a grant of administration before the death of a person, however regular, could be sustained anywhere. The decision of the Probate Court, that the man was dead, would not be conclusive against him; and the fact of residence is of equal importance to give the particular court jurisdiction, and the decision of one point is no more conclusive than the decision on the other."

This case (*Beckett v. Selover*) in so far as the question of the residence of the deceased at the time of death is concerned was overruled, and we think rightly so, in the subsequent case of *Irwin v. Scriber*, reported in 18 Cal. 499, but it has not been disturbed as respects the question of the *fact of death*. Nor do we think it ought to be. It is a great mistake to place the fact of death and the place of residence of the supposed intestate in the same category. Until there is a death there is no subject-matter for the jurisdiction of any court. What is the subject-matter? It is the appointment of a personal representative to a *decedent*, who is without one. If the subject-matter exists, the question whether the court had jurisdiction in the particular case, or not, may depend, as said by the Court of Appeals of Virginia in *Andrews v. Avory*, 14 Gratt. 236, "upon a variety of facts; as whether the deceased resided in the county whose court made the order; or had land there; or died there; or had estate of any kind there. If, after passing upon these facts and taking cognizance of the case, the order of the court could at any period, in any collateral proceeding, be avoided by evidence that the decedent did not reside, or die, or leave estate in the commonwealth, all the inconveniences

and other evils would be produced which are referred to in *Fisher v. Bassett*, 9 Leigh, 119, and other cases before cited, and which are designed to be prevented by the principles laid down in those cases." Some of those evils are thus stated by Mr. Justice Roosevelt in the case of *Monell v. Dennison*, 17 How. Pr. 426: "To allow it (the decision upon the question of inhabitaney) to be called in question collaterally, and on every occasion and during all time, would be destructive of all confidence. No business in particular depending on letters testamentary or of administration could be safely transacted. Payments made to an executor or administrator, even after judgment, would be no protection. Even if the debtor litigated the precise point and compelled the executor to establish it by proof, the adjudication would avail him nothing should a subsequent administrator, as in this case, spring up, and after the lapse of a fifth of a century demand payment a second time, when a scintilla of evidence on one side remained, and all on the other had perished. A large number of titles, too, depend for their validity on decrees of foreclosure, and these decrees are often made in suits instituted by executors or administrators or their assigns. Must these, too, be subject to be overhauled at any period, however remote, on the nice question of residence—a question often difficult to decide where the facts are close, and much more so, of course, where the facts are obscured by lapse of time and loss of documents and witnesses?" Such a doctrine the court correctly held too dangerous for judicial sanction.

But here was an application by a party whose estate had been administered, upon the supposition that he was dead, to show to the court in which the proceedings were had, the fact that he was all along alive, and the consequent non-existence of the *subject-matter*, without which no jurisdiction could by possibility have attached to any court. That it was competent for him to prove the fact we have no manner of doubt, and we are also of opinion that he sought to make the proof in the appropriate tribunal. (*State v. McGlynn*, 20 Cal. 233; *Hamberlin v. Terry*, 1 S. & M. Ch. 589.)

Demurrer sustained and proceedings dismissed.

McKINSTEY and SHARPSTEIN, JJ., and MORRISON, C. J., concurred.

MYRICK, J., concurred in the judgment.

McKEE, J. I concur. Administration of the estate of a living person is void, *ab initio* and throughout. The only jurisdiction a Probate Court has in respect to the administration of estates is over the estates of deceased persons. It has no jurisdiction whatever to administer the estates of living persons as if they were dead. Cases in support of these plain propositions abound in the books. For it has often happened that many "Enoch Ardens" have had to assert in the courts their right to property of which they have been, in their absence, unlawfully deprived by void proceeding against them in probate courts. In addition to those cited by Mr. Justice Ross, the cases of *M'Pherson v. Cunliff*, 11 S. & R. 422; s. c. 14 Am. Dec. 642; *Appeal of Peebles*, 15 S. & R. 42; *Wales v. Willard*, 2 Mass. 120; *Smith v. Rice*, 11 Id. 507; *Bolton v. Jacks*, 6 Robt. 166; *Morgan v. Dodge*, 44 N. H. 255; *Melia v. Simmons*, 45 Wis. 334; and *D'Arusment v. Jones*, 4 Lea, 25, will be found instructive and conclusive upon the question involved in the present case. I know of no case opposed to the doctrine of those cases except it be the case of *Roderigas v. East River Savings Institution*, 63 N. Y. 460. In that case the Supreme Court of New York held that money paid to the administrator of a supposed decedent could not be recovered back, although it appeared that at the time of issuing the letters of administration the party was not dead. But in *Lavin v. The Emigrant Industrial Savings Bank*, 18 Blatchf. 1, in the Circuit Court of the United States for the State of New York, it was decided that that case had no support elsewhere in the authorities of the English or American courts. A living person, says the court, cannot be concluded by a surrogate's decision that he is dead. As to him, such a decree is absolutely void, and he may claim his property as taken from him "without due process of law."

See *Melia v. Simmons*, 1 Am. Prob. R. 143, and note; *D'Arusment v. Jones*, 2 Id. 424.

HEMENWAY vs. HEMENWAY.

[184 Massachusetts, 446.]

ADJUSTMENT BETWEEN LIFE-TENANT AND REMAINDERMAN.—BONDS BOUGHT ABOVE PAR AND AT PAR AND ACCRUED INTEREST.

Where testator bequeathed a fund to trustees to hold such property as they received, with a discretion to sell the same and substitute other investments, and after discharging certain annuities to pay the remaining "net rents and income" to certain persons for life, with remainder over, and certain bonds left by the testator, and worth more than par at his death, had become due, and others had been bought by the trustees at par and at par and accrued interest, the life-tenants, as against the remaindermen, are entitled to all the net income on the bonds owned by testator or bought by the trustees at a premium, and sums paid for accrued interest should be repaid from interest subsequently received.

BILL for construction of the will of Augustus Hemenway, filed by the trustees.

J. L. Thorndike, for plaintiffs.

F. E. Parker, for life-tenants.

C. A. Welch, for remaindermen.

HOLMES, J. The plaintiffs are trustees of a residuary fund, bequeathed to them in trust, "to hold the said property as they may receive the same, or at their discretion to sell the same, or any part or parts thereof, and to invest the proceeds of such sale or sales according to their best judgment, and so again, and whenever and as often as they may deem it expedient, to sell any substituted property at any time held upon these trusts, * * * * and to invest the proceeds * * * according to their best judgment, with power to convert real estate into personal estate, and personal estate into real estate," with injunctions of caution and to prefer a lower interest and gain to a larger one which may involve risk of loss; and, subject to the payment of certain annuities out of the income,

"to pay all the remaining net rents and income during the continuance of this trust * * * to such of the said four persons, namely, my wife and three children, as may be living at the time of payment, and to the lawful issue then living of any my child who has then deceased, * * * such issue taking by representation." Twenty years after the death of the survivor of the above four, the trust property to be conveyed to the testator's issue then living, they taking by representation according to the stocks.

At the death of the testator on June 16, 1876, he left United States bonds which were worth more than par, and which fell due December 31, 1880, and June 30, 1881. Also bonds of the State of Massachusetts, the city of Boston, and the Chicago, Burlington and Quincy Railroad Company, which in like manner were then worth more than par, and which either have fallen due or will fall due within a comparatively short time.

Since the testator's death, the plaintiffs have bought Union Pacific Railroad Company bonds at a price slightly above par, and Burlington and Missouri Railroad Company bonds at par and what is known in the market as accrued interest. By the usage of the Boston market, these bonds are sold at a certain price, and the accrued interest is then added to make up the full sum to be paid by the purchaser. In New York they are sold "flat," as it is termed; that is, for a price which includes accrued interest.

The short questions which we are asked to determine are: Whether the life-tenants are entitled to all the interest, after deducting expenses, on the bonds received from the testator, or bought by the trustee when worth more than par; and also whether the sums paid in respect of accrued interest on the Burlington and Missouri Railroad Company bonds should be retained from the interest subsequently received. The former of these two is of very great and growing importance.

It is said, that when a bond having only a short time to run is purchased at a price above par, inasmuch as it is certain that when it is paid off the trustee will only receive par, the investment is necessarily a wasting one to the extent of the premium

paid, and that the rights of the remainderman are sacrificed in favor of the tenant for life, unless a due proportion of the interest is set aside to make good the waste occasioned by the approach of the day of payment. It is pointed out that otherwise the trustees in time might sacrifice the whole fund. The life-tenants, while conceding the force of this argument, reply that the court must assume any investments, which it would sanction, to be absolutely safe, and therefore that the only ground of difference in the value of such investments, which the court can recognize, lies in the rate of interest which the investments pay respectively. If that be greater than the market rate, the bond will stand above par; if less, below. And it follows, they say, from the same reasoning which would entitle a remainderman to have the capital protected by a reservation from interest if a short bond is purchased above par, that the tenant for life must have his full interest made good out of the increasing capital if a short bond is purchased below par. If a rule be laid down which will work both ways, the tenants for life seem content. And the remaindermen, of course, desire a determination that the premiums must be made good in all the investments, and a rule broad enough to insure that result on the facts before us.

We incline to agree with the argument for the life-tenants, that the only legal reasoning which would warrant throwing the burden of premiums upon interest must start from the assumption that the premium is paid in respect of interest, and that, upon that assumption, the life-tenants have an equally strong claim upon the increment of capital in the case of short bonds bought below par. But we do not think that the general rule suggested can be laid down with safety for either class of cases. The only conclusive reason which could be offered in its favor would be, that it was shown to aid in doing substantial justice between tenant for life and remainderman. And that, we think, is not made out. In the first place, the proposed rule reposes upon a fiction. It is not true that premiums are paid for interest alone. They are paid for the safety of the capital as well. Probably, much the greater part of them is made up of this and other elements which ought to fall on the re-

mainderman. The court can hardly be asked to close its eyes upon the truth, in order to lay down a rule which can only be justified on the ground that it is actually beneficial. Moreover, as the decisions of this court show that trustees have been exonerated from liability for investments which turned out not to have been safe, there is not even a technical foundation for the postulate.

But we are not only required to start with a fiction. As the next step, we must lay down a fixed and arbitrary rule for what is really in a constant state of fluctuation. For, in order to estimate how much of a given premium is paid for the difference between the interest of the bond and that which the life-tenant ought to receive, we have to establish a rate for the latter as our starting-point. This would naturally be the market rate, if that were ascertainable. But there would be no justice in stopping at the rate when the bond was bought merely. If theoretical accuracy were possible, the tenant should receive the current rate of interest at every moment. But the current rate is continually varying from day to day and from month to month, apart from the greater variations to be found by taking a series of years. These variations alone would make actual calculations impossible, but they are a strong objection to establishing a constant rate for interest of the tenant for life. Unless the court should take upon itself to study the market and to make new orders from time to time, it might well come to pass that the judicial rate should differ more widely than that of the bond from the rate of the market.

The variations in the rate of interest are not the only ones. The capital itself also varies from day to day for reasons independent of the rate of interest. There is no difference in the rights of the parties, or the duties of trustees, at different moments. These remain substantially the same, for every day that an investment is kept, as they are when it is made. A determination not to sell, if a sale is possible, stands on much the same footing as a purchase. The same reasons that are offered for laying down an absolute rule that compensation shall be made to the capital out of income for a premium paid for bonds,

equally require a similar further allowance if the bonds advance, or an offset on the other side of the account if they fall for other reasons than the approach of maturity.

We think, then, that it would be inexpedient and unjust to lay down such a sweeping general principle as is contended for on behalf of the remaindermen, either with or without the complement which would make it satisfactory to the tenants for life. If a universal rule were attainable at all, it would be more easily reached by confining trustees to one or more investments of a kind that would never be paid off, or of which the day of payment was so remote as not practically to affect their value during the continuance of the trust. For then it would matter little or nothing to either party whether the purchase was at a price above or below par. But the precedents in this Commonwealth are against such a course; and the reasons on which the early cases are founded have rather gained than lost in force.

The English cases go the whole length of deciding that, whenever a fund is held upon an authorized permanent investment, the tenant for life receives the entire actual income. Among the investments authorized by statute was East India stock. This yielded a higher rate of interest than the three per cent. government stock, and was therefore desired by life-tenants; but it was liable to be paid off, and it sold at a premium, and was therefore objected to by remaindermen. When a trust fund was in court, the court would not ordinarily direct an investment in this stock (*Cockburn v. Peel*, 3 De G., F. & J. 170; *Ungless v. Tuff*, 9 W. R. 729; *In re Boyces*, I. R. 1 Eq. 45; *Waite v. Littlewood*, 41 L. J. [N. S.] Ch. 636); unless there were special reasons for favoring the life tenant. (*Equitable Reversionary Interest Society v. Fuller*, 1 J. & H. 379, affirmed July 17, 1861; Lewin on Trusts [7th ed.], 284; *Bishop v. Bishop*, 9 W. R. 549; *Cohen v. Waley*, 7 Jur. [N. S.] 937.) But in *Cockburn v. Peel*, Lord Justice Turner was careful to say that the decision was not intended to embarrass trustees in the exercise of the discretion which the statute gave them when the funds were not in court, and that they would be entitled to protection when they acted *bona fide* in the exercise

of that discretion. And this statement was affirmed and applied in *Hume v. Richardson*, 4 De G., F. & J. 29, the next year. The latter case then went on to decide that, where trustees, in the exercise of their discretion, retained or made investments in East India stock, the tenant for life was entitled to the whole income arising from such investments. The same conclusion was reached by Lord Cairns in a later case, in which *Hume v. Richardson* was not referred to, with regard not only to East India stock, but other securities which the testator had authorized as permanent investments, and which otherwise would have been unauthorized. (*Brown v. Gellatly*, L. R. 2 Ch. 751. See, further, *Meyer v. Simonsen*, 5 De G. & Sm. 723, 726.)

There is another branch of *Brown v. Gellatly* similar in principle to *Kinmonth v. Brigham*, 5 Allen, 270, which has no bearing on this case. It often happens, of course, that testators leave property of a kind which executors would not be authorized to invest in, such as ships, or a share in a partnership. In such cases the law allows the executor a proper time for the purpose of disposing of such property. But the fact that time is allowed in order to prevent a sacrifice, does not make the investment an authorized one *ad interim*, in such sense as to entitle the tenant for life to the actual dividends. The conversion would be made at once if it were practicable, and the rights of the parties are not affected by the delays. The fund is treated as if converted, and the tenant for life is allowed a fixed percentage on the amount. (*Meyer v. Simonsen*, *ubi supra*; *Re Llewellyn's Trust*, 29 Beav. 171, 174; *cf. Dimes v. Scott*, 4 Russ. 195, 209.) The same thing is true where a testator allows time for the same purpose. In *Brown v. Gellatly* the testator had left ships, etc., and had authorized his executors to sail them until they could be satisfactorily sold, which he left to the discretion of his executors. As it was evident that this was only done with the intent to have the ships converted cautiously and in proper time, it was held that the tenant for life was not entitled to the actual profits of the ships, but to four per cent. on a valuation as at the death of the testator, and no more. The ships were not made an authorized per-

manent investment by reason of the fact that a long time was allowed to dispose of them.

Our refusal to lay down a general rule does not put the capital in danger of being exhausted. The trustee, who has the fund always in his hand and under his eyes, must take reasonable care to hold the balance even between opposing interests. The answer to the extreme cases supposed on behalf of the remaindermen is, that, if they were conceivable where the trustee was acting in good faith, they would be inconsistent with that reasonable discretion which he must exercise at his peril. This responsibility is what trustees are paid for assuming, and we have no reason to suppose that it has proved too great to be borne. We think that the course most advantageous to all parties concerned is for us to confine ourselves to dealing with each case that may come before us on its particular circumstances, and to allow trustees all the freedom that is consistent with caution and fairness.

Coming, then, to the particulars in the present case, we think the trustees were authorized to retain the testator's bonds mentioned in the bill until they were paid off. By the residuary clause they are "to hold the said property as they may receive the same, or at their discretion to sell the same." The power thus given to hold the property as they may receive it, is not an extension of the time for conversion, but authority to continue an investment as such, and the whole net income of investments thus authorized must go to the tenants for life by the terms of the will. (*Brown v. Gellatly*, *ubi supra*; *Bulkeley v. Stephens*, 10 L. T. [N. S.] 225; *Green v. Britten*, 1 De G., J. & S. 649.)

With regard to the bonds of the Union Pacific Railroad Company purchased in 1878, and then having nearly eighteen years to run, the fact that a small premium was paid is not, of itself alone, enough to prevent the tenants for life from receiving the net interest, and the circumstances, so far as disclosed, show no special reason why they should not receive it. The investment constitutes a very small proportion of a large estate. Nothing shows that the premium was paid for interest above the market rate. We have no reason to doubt that, tak-

ing the whole administration of the trust into account, the balance has been evenly held between the two parties; and the relation between the remaindermen and the life-tenants is such that there is less call than there might be in some other cases for treating the life-tenants with great strictness.

Lastly, as to sums paid in respect of accrued interest. It is true that there are strong decisions of Vice-Chancellor Kindersley to the effect that no allowance is to be made for them except under very special circumstances. (*Scholefield v. Redfern*, 2 Dr. & Sm. 173, 182; *Freman v. Whitbread*, L. R. 1 Eq. 266. See also *Bostock v. Blakeney*, 2 Bro. C. C. 653; Lewin on Trusts [7th ed.], 297.) But the reason offered, that it would lead to burdensome and expensive investigations, does not seem to us to apply here. By the Boston usage, the sum paid for accrued interest is always expressly stated, and we see no reason why it should not be repaid from interest subsequently received. In has been in some cases in England. (*Londesborough v. Somerville*, 19 Beav. 295; *Bulkeley v. Stephens*, 3 N. R. 105, 107; s. c. 10 L. T. [N. S.] 225, 229.

Decree accordingly.

What is principal and income upon purchase of stocks by trustees for life tenants and remaindermen.—*Hemenway v. Hemenway* presents a phase of what is known as "the rule in Minot's Case." The case of *Minot v. Paine* (99 Mass. 101) established as the rule, in Massachusetts, that stock dividends are to be regarded as principal, and cash dividends as income. This principle has been uniformly adhered to in that State. *Deland v. Williams*, 101 Mass. 571; *Leland v. Hayden*, 102 Id. 542; *Rand v. Hubbell*, 115 Id. 146.

The Pennsylvania rule is that whatever surplus had been fully earned at the testator's death, by whatsoever name it may be called, is principal, and whatever is earned upon that principal after the testator's death is income, call it what you will. *Earp's Appeal*, 28 Penn. St. 368.

Biddle's Appeal sustains and approves this doctrine. This question has provoked much discussion. See Perry on Trusts, c. 18, and three interesting and extremely valuable little pamphlets, by a layman, wherein the matter is fully and learnedly discussed, published by G. P. Putnam's Son, New York, entitled "Common Sense *versus* Judicial Legislation," "Stock-dividends: the Rule in Minot's Case Restated, with Variations by

the Supreme Judicial Court of Massachusetts," and "A Third Chapter on the Rule in Minot's Case."

The rule appears not to be well settled in England. A. gave his wife a life estate in one-seventh of a colliery. For several years profits were made, but retained to the credit of a profit and loss account. Afterwards profits were divided, but at the death of the tenant for life a large sum remained to the credit of the profit and loss account, the greater part of which had been invested in the works of the colliery. In this case the court held that the share of the testator in the sum standing to the credit of the profit and loss account belonged to the persons entitled in remainder, and not to the executor of the tenant for life. *Straker v. Wilson*, 6 L. R. Ch. 503.

This is the rule in *Minot's Case*. The same rule is found in other English cases. *Browne v. Collins*, 12 L. R. Eq. 586; *Furley v. Hydes*, 42 L. J. Chan. 626.

But there is a line of cases that hold a contrary doctrine, coinciding with the Pennsylvania rule. Where bonuses were declared upon stock after the death of the testator the court held the bonuses were income and not capital of the estate, and as such belonged to the tenant for life. *Dale v. Hayes*, 40 L. J. Chan. 244; 24 L. T. (N. S.) 12; 19 W. R. 299. See also, *s. p. Maclaren v. Stainton*, 11 L. R. Eq. 382; *Lean v. Lean*, 32 L. T. (N. S.) 305; 28 W. R. 484; *Lambert v. Lambert*, 29 L. T. (N. S.) 878; 22 W. R. 359; *In re Tinkler*, 45 L. J. Chan. Div. 185.

"Proceeds" means "income." *Thomson's Appeal*, 89 Penn. St. 86; *Robert's Appeal*, 92 Id. 407.

Where income was given to a wife for life it was held that premiums received by her on certain gold coin belonging to the testator's estate was part of the *corpus* and not income. *Van Blarcom v. Daget*, 31 N. J. Eq. 783. *Contra, Re Stutzer*, 28 Hun, 481.

Profits upon sale of stock are principal and not income. *Whitney v. Phoenix*, 4 Redf. 180.

Increase of live stock belongs to the owner of the particular estate. *Major v. Herndon*, 78 Ky. 123.

Where there is a bequest of income with remainder over of the principal, the tenant for life is entitled to the income to be calculated from the death of the testator. *King's Estate*, 11 Phila. 26; *Ayer v. Ayer*, 128 Mass. 575; *Van Blarcom v. Daget*, *ubi supra*; *Gibbs v. Gibbs*, 26 L. T. (N. S.) 865; *Wright v. Lambert*, 6 L. R. Chan. Div. 649; *Stewart v. Lawson*, 22 W. R. 822. *Contra, Guinness v. Cottingham*, 7 Ir. R. Eq. 109.

Commissions for collecting and paying interest, taxes, etc., must be paid out of the income, and not be made a charge upon the principal. *Danly v. Cummins*, 31 N. J. Eq. 208; *Sewall's Estate*, 11 Phila. 73; *Stubbs v. Stubbs*, 4 Redf. 170.

Where a fixed income is bequeathed and the income of the estate fails,

or is insufficient, the principal must be resorted to. *Bonham v. Bonham*, 83 N. J. Eq. 476; *Haydel v. Hurck*, 72 Mo. 258. *Contra*, *Delaney v. Van Aulen*, 84 N. Y. 16; reversing s. c. 21 Hun, 274.

The expense of the burial of the tenant for life, where this appears to be the intention of the testator, will precede the claims of remaindermen or their creditors. *Miles v. Peabody*, 64 Georgia, 729.

It is the duty of the executor to protect the interest of the remainderman and so manage the estate that he may certainly come into the enjoyment of the fund. *State v. Robinson*, 57 Maryland, 486.

The remainderman may have a bond, to this end, from the executor, in case there is danger of waste. *Ames v. Williamson*, 17 West. Va. 673.

Cragg v. Riggs (5 Redf. 82) is a recent and valuable case upon this subject, many cases being cited.

PAGE *vs.* FOUST.

[89 N. C. 447.]

WORD "EFFECTS" MAY INCLUDE LAND.

The word "effects" may be construed to include real estate to effectuate testator's intention.

PROCEEDING to assign dower.

The opinion states the facts.

J. W. Mauney, for plaintiff.

Kerr Craige, for defendants.

SMITH, C. J. The plaintiff, the widow of John A. Page, who died intestate and without issue, brings this suit against the *feme* defendants, his sisters and heirs-at-law, and their husbands to procure an assignment of dower in the land described in her petition, whereof she alleges the intestate was seized and possessed of an estate in fee.

The defendants resist the plaintiff's claim, and say that the intestate derived title to the land under the will of his father, Dempsey Page, made in 1879, by the provisions of which an estate for life only was devised to the said intestate, if he died

without issue, with remainder to the defendants, Mary and Laura, in fee.

The solution of the controversy in respect to the title depends, therefore, upon the construction of the testator's will, so much of which as bears upon the issue is contained in the first four clauses, and is as follows :

" Item 1. I give and devise to my beloved son, John Allison the plantation on which I now live, containing about 94 acres, lying on the north side of Sherrill's Foard road, adjoining Mrs. Krider, Mrs. Kestler, and others ; also one-half of my old plantation, containing about 78 acres, lying on south side of Witherow's creek and joining M. A. File, Mrs. Krider and others ; also, my two-horse wagon and harness, together with two mules (his choice), one bedstead and furniture (his choice), one bureau (his choice), and provisions enough to last him and mules until he can make and gather a crop."

" Item 2. I give and devise to my beloved daughter Mary Nay, seventy-five acres of land, to be taken off from the Sloop place, on which they now live, to be taken off from said place next to M. A. File's fifty acres, being that run off by W. A. Houck and the other 25 acres, joining James F. Cowan and M. A. File ; to have and hold during their life-time, and then to go as hereinafter provided."

" Item 3. I give and devise to my beloved daughter Laura E. one-half of my old home place, of which mention is made in item first ; and also, what will remain of the Sloop place, after Mary's share is taken off ; also, she is to have one year's provisions laid off to her for her and her two children."

" Item 4. It is my will that if any of my children die without legal bodily heirs, or children, then, and in that case, the *effects* herein willed to them to return to the balance of my children then living, or their children, if they are dead and have left any legal bodily heirs. In case of Mary and her husband, should she die first, her husband is to have the use of her effects during his life-time and then return as afore stated."

The result of the controversy depends upon the interpretation put upon the word "*effects*," used by the testator in the contingent dispositions made in the event of the death of any

of the devises without issue. If it comprehends the lands previously given as well as the personal estate, the title of the intestate ceased at his death, and the right to dower does not attach; if the term is used in its more restricted and common acceptation, and confined to the personal property bequeathed, the plaintiff is entitled to an allotment of dower in the lands devised to her husband.

"The fundamental rule in the construction of wills," as is said by Battle, J., "is to ascertain the *intention* of the testator, and for that purpose all the parts of the will are to be taken in view, and effect is to be given, as far as possible, to every clause." (*Owen v. Owen*, Bush. Eq. 124.)

It is also a well established rule of construction that a testator is presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless from the context it appears that he uses them in a different sense; in which case, the sense in which he thus appears to have used them, will be the sense in which they are to be construed. (Wig. Wills Prop. 1, page 58.)

That the term *effects* is capable of expansion, so as to embrace real and personal estate, when it is seen that such is the testator's intention, from an inspection of the provisions of the instrument, is established by past adjudications.

"I take effects," says Lord Mansfield, in interpreting a residuary disposition of all the testator's effects, both real and personal, "to be synonymous to worldly substance, which means whatever can be turned to value; and that, therefore, real and personal effects mean all a man's property." (*Hogan v. Jackson*, Cowp. 304.)

So, Sir William Grant, Master of the Rolls, declares, in *Campbell v. Prescott*, 15 Ves. 507, "there is no case for the restricted sense which the grandchildren put upon the words '*all my effects whatsoever*;' " adding, "Lord Mansfield says, that the word '*effects*' is equivalent to property or worldly substance."

To the same general purpose are the cases of *Chilcot v. White*, 1 East, 394; *Andrews v. Lainchbury*, 11 East, 290;

Franklin v. Trout, 15 East, 394; 2 Williams Exrs. 854; Theo. Law of Wills, 159.

In a recent case which came before the Vice Chancellor Sir Richard Malins, the authorities were carefully reviewed, and it was decided that by the use of the words "I give all the rest, residue, moneys, chattels, and all my other effects," notwithstanding the association of the latter words with articles of personal property before enumerated, "the testator meant to include everything he had in the world, whether *real property* or *personal property*." (*Smyth v. Smyth*, 8 Law Rep. Chan. Div. 561.)

There are cases where the will disposes of "effects" with very comprehensive descriptive terms following, such as "of what nature soever" (*Hick v. Dring*, 2 M. & S. 448); or where the language is, "all my effects" (*How v. Eastles*, 15 M. & W. 450), in which it is held that land was not embraced; but in all, it is conceded that a larger scope will be given to the disposition, where it can be collected from other parts of the will, that such was the testator's intention.

Thus, in the former of the two cases last cited, it is said: "If the court can see that the testator meant by it to pass his real estate, then the judgment must be for the plaintiff."

The inquiry recurs as to the meaning of the testator in the use of the word found in the clause limiting the property given in remainder, and we are at no loss in arriving at the sense in which he employs it.

1. Land only is devised to Mary, and in the concluding part of the fourth item it is in direct terms provided that, in case of survivorship, her husband shall have the use of *her effects* during his life-time. "*Effects*" are here applied to the devised land, and can have no other significance, for there is no other property to which they can attach.

2. Land is also given to the defendant Laura, with an allowance of provisions for the support of herself and children for one year. It cannot be supposed that articles intended to be consumed were to return to the other children in the event of the death of Laura without issue, and there is nothing but her land upon which this devise over can operate, so that it must

have been in the mind of the testator when he described it as part of the "effects" thus limited.

Whatever may be the significance of the word unexplained by the context, it is plain that in choosing it the testator meant to include the devised lands given to each of his children, and in this sense we must give it operation.

There is error in the ruling of the court, and there must be judgment that the defendants go without day and recover their costs.

Error.

Reversed.

BIDDLE'S APPEAL.

[99 Penn. St. 278.]

RIGHT TO SUBSCRIBE TO INCREASE OF CAPITAL STOCK IS CAPITAL,
NOT INCOME.

As between a tenant for life and remainderman of stock held in trust, money received by the trustee from a sale of the right to subscribe to an increase of capital stock is principal.

APPEAL from the Orphans' Court of Philadelphia county.

Accounting of the executor of Mary Condry, deceased.

In addition to the facts appearing in the opinion it was shown that the increase in the capital stock did not affect the market value of the old shares but reduced their intrinsic value seventy-five cents a share.

The court below adjudged the money received by the trustee to be additional principal in his hands.

Edward Hopkinson, for appellant.

J. B. Townsend, for appellees.

MEROUR, J. This contention is between the tenant for life and the residuary legatee, under the will of Mary Condry, who died on the 29th of June, 1880. She gave and bequeathed all her estate to the appellant, in trust, to collect and receive the income thereof for her own use during life, and at her death, the testatrix gave one-half the residue to the appellee. The property bequeathed was stock of the Insurance Company of North America. At a meeting of the stockholders of the company, held on the 15th November of the same year, it was resolved to increase the capital stock from \$2,000,000 to \$3,000,000 by issuing 100,000 shares at \$10 per share, in the proportion of one share to each two shares held by the stockholders—they to pay \$10 per share for each share of the new stock, and also \$10 per share for the privilege of subscribing, the proceeds of which privilege to be added to the surplus fund of the company. Instead of subscribing for the new stock, the executor sold the privilege of subscribing therefor. The question is, whether the sum thus realized should be awarded to the appellant as income, or whether it belongs to the principal of the estate?

The entire value of the stock, with all its incidents, at the death of the testatrix, constituted the principal of the estate. On this principal, the appellant was entitled to the income. Whatever value beyond par the stock then had, by reason of the large surplus fund of the company or otherwise, attached to the stock and formed a part of the principal. The appellant was not given any part of this aggregated value of the stock. The income therefrom was all she was entitled to receive. Whatever was capital must remain capital. The executor could not take therefrom and give to the life-tenant, to the injury of the residuary legatee. The surplus of the company was large. This greatly increased the value of the stock. It is not shown that the stock was of greater value on the 15th November than on the day of the death of the testatrix, nor that the surplus fund had been increased in the meantime.

The right of a stockholder to subscribe for new stock was a right to change the form of the investment; but that which existed as principal did not, by the exercise or sale of that

right, become income. The appellant became entitled to the income on that principal in its changed form ; but not to the principal itself.

The distinction between the surplus fund, existing at the time of the death of the testator, and a fund accumulated afterwards, is distinctly recognized in *Earp's Appeal*, 4 Casey, 368. That which had accumulated before the death of the testator, was held to be part of the principal of the fund, and that which accumulated after his death to be income. The correctness of the principle there ruled, is expressly affirmed in *Wiltbank's Appeal*, 14 P. F. Smith, 256, although, under the facts of the case, the profit on a sale of the newly subscribed stock was held to be income. *Moss's Appeal*, 2 Norris, 264, is in entire harmony with the conclusion at which we have arrived. There the trust fund consisted of stock, and each of the stockholders was given the privilege of subscribing and paying for as many shares of the new stock as he held of the old. The estate of the testator was entitled to subscribe for one hundred shares of the new stock. The executors, not having funds sufficient to pay the sum required for so much stock, sold the option to subscribe for sixty shares thereof, and with the money realized therefrom subscribed and paid for the remaining forty shares. The life-tenant claimed these shares, thus acquired, to be income ; but it was held they formed a portion of the capital of the residuary estate. It was there said by our brother Paxson, there is no doubt about the law. The difficulty is in applying the law to the facts of the particular case. It is true, one reason given for the ruling was, that after the increase of stock, the value of each share decreased. Such must be the natural effect of an increase produced in part by putting an existing surplus fund into certificates of new stock. The additional sum paid in for each share being less than the actual value of a share of the old stock, necessarily lessens the value of the latter. In the present case, the diminution in the value of the stock and in its market price is shown to be small. That, however, we think is not the only evidence of what constitutes principal or capital. In so far as the fund, which was a part of the residuary estate, was used to acquire the new stock,

the latter took the place of the former. It was not income, but capital in a changed form. The appellant is not entitled to the *corpus* of the new stock, but to its income.

Decree affirmed, and appeal dismissed at the cost of the appellant.

SHARSWOOD, C. J., and TRUNKEY, J., dissented.

EARLE vs. EARLE.

[93 New York, 104.]

EXECUTOR AND TRUSTEE.—ACCEPTANCE OF TRUSTS.—RESPONSIBILITY FOR ACTS OF CO-TRUSTEES.

Where a will vests trusts in the executors as such, an acceptance of the office is an assumption of the trusts.

An executor or trustee is bound to exercise due caution in respect to the approval of, and acquiescence in the acts of co-trustees, and if he deliver over to them the entire management of the estate, he is responsible for losses which diligence on his part would have prevented.

APPEAL from a judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in plaintiff's favor entered on a report of a referee.

Action to compel an accounting and charge executors and trustees with funds lost through their negligence.

Samuel Hand and *John M. Martin*, for appellant.

Richard L. Sweezey, for respondents.

RAPALLO, J. The objection taken by the appellant in his answer, and urged upon the trial that his former co-executor, Charles Dodd, was a necessary party to this action, should not, in our judgment, be sustained. Almost immediately after the final accounting of all the executors before the surrogate of the

city of New York had been completed, and a decree had been entered thereon, dated April 25, 1861, finally settling the accounts of the executors and ascertaining the amounts in their hands, and directing the disposition thereof, Mr. Dodd removed from the State of New York to the State of Connecticut. Application was thereupon made by Morris D. Earle, one of the legatees, to the surrogate of the city of New York for the revocation of the letters testamentary of Mr. Dodd on account of his non-residence; and he refusing to give security as a non-resident executor, and appearing before the surrogate and assenting to the revocation of the letters, the surrogate thereupon made an order or decree, revoking the letters and his authority to act as executor. This order was dated May 30, 1861, and from that time Mr. Dodd ceased to act as executor or trustee under the will of Morris Earle.

The trusts contained in the will were vested in Mr. Dodd in his capacity of executor, and were attached to his office. They were not personal, nor did they involve the exercise of discretion. By abandoning his office of executor, and ceasing to act as trustee, he renounced them, and they devolved upon the continuing executor and executrix, as they would have done on an administrator with the will annexed, had all the executors been removed or died. The court, on the trial of this action, found, as facts, that at the time of the removal of Mr. Dodd the estate had sustained no loss, and that it had not at any time sustained any loss by reason of any investment made by him. His accounts had been finally settled, and he left the funds of the estate under the control of the continuing executor and executrix. Whatever neglect or default occurred, was after the revocation of Mr. Dodd's letters, and was chargeable to them and not to him. Under these circumstances, he was not a necessary party to this action.

The main controversy in the case is upon the question of the liability of the appellant to account for the fund which was, by the surrogate's decree, found to be in the hands of the executors in April, 1861. This decree was based upon a joint account rendered to the surrogate by William P. Earle and Charles B. Dodd, executors, and Mary E. Earle, executrix; and

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upon this accounting it was admitted by them, and found by the surrogate, that the amount with which they were chargeable, after crediting all payments, was \$206,807 36 of principal, and \$5,472 29 of interest, all of which they had on hand. By their account it appeared that these sums were invested in bonds and mortgages, State and city bonds, and cash in bank. The executors were allowed by the surrogate costs and commissions amounting to about \$2,739, and were directed to set apart one-third of the principal of the estate for the purpose of paying the income thereof to the testator's widow, Mary E. Earle, during her life, pursuant to the directions of the will. This third amounted to the sum of \$74,741 03, of which Mrs. Earle was to receive the interest during her life, and at her death it was to be divided among the seven children of the testator.

After setting apart this sum and paying to Morris D. Earle and James E. Earle, the two eldest sons, in full, their shares of the principal, there remained for distribution among the remaining five children, four of whom were minors, \$106,772 95 of principal, and \$2,532 15 of interest, with the accumulations since April 25, 1861, and each child was also entitled to one-seventh of the fund of \$74,741 03, directed to be set apart for the widow, to be paid to them at her death.

By the interlocutory judgment in this action, William P. Earle, the appellant, and Mary E. Earle, the widow and executrix, were required to account; William P. Earle contends that he is not liable, on the ground that he never had possession of the funds or securities belonging to the estate; that up to the time of the accounting Mr. Dodd had possession of all the assets, and after the accounting of the executors, he, William P. Earle, did not take upon himself the execution of the trusts created by the will, and that after the retirement of Mr. Dodd the whole management of the estate was in the hands of Mrs. Earle and her two sons, first Morris D., and afterward James E., and they had possession of the securities, and that the appellant's position was merely passive, he taking no active part in the administration of the estate.

On these points we concur with the conclusions of Freed-

man, J., before whom the action was tried, and whose opinion, delivered at the special term, was adopted by the general term. Mr. Earle, by accepting the office of executor, and qualifying as such, also accepted the trusts conferred upon the executors. He rendered his account as executor, wherein he charged himself jointly with his co-executor and executrix with the funds of the estate, and was by the decree of the surrogate charged therewith, and directed as to their disposition. He thus became bound jointly with the executrix to execute the decree, or to discharge himself in some legitimate way from the duties of the trust. Instead, however, of taking any steps to relieve himself from this obligation, he continued to act. The decree was dated April 25, 1861, and Mr. Dodd's letters were revoked May 30, 1861, and as early as June 13, 1861, the appellant signed, as executor, a check drawn against the account of the estate of Morris Earle, deceased, in the City Bank, to the order of Mr. Dodd, individually, for \$9,500, to be invested in a loan by the estate, on bond and mortgage, and on the 17th day of July, 1861, the appellant joined with Mrs. Earle in executing a satisfaction-piece, in which they described themselves as sole acting executor and executrix of the will of Morris Earle, deceased, and for a long series of years thereafter he from time to time, sometimes alone and sometimes in conjunction with Mrs. Earle, continued to execute satisfaction-pieces of mortgages belonging to the estate, and he also executed, as executor, assignments of mortgages held by the estate, and he never took any steps to discharge himself from his duties as executor or trustee. Under these circumstances he cannot claim exemption from responsibility as such.

He now asserts that the funds of the estate went into the hands of his co-executrix, Mary E. Earle, and that an executor is liable only for his own acts and defaults, and not for those of a co-executor, or for funds collected by a co-executor or trustee. This proposition is true as a general rule, though it has qualifications which it is not necessary to discuss here, for it is not the fact that the funds or assets of the estate went into the hands of Mrs. Earle or were administered personally by her. They consisted of cash on deposit in the National City

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Bank to the credit of the estate, against which account either the executor or the executrix had power to draw, and of bonds and mortgages, and other securities, which, when Mr. Dodd withdrew (as appears from the testimony of James Earle, who was a witness called by the appellant), were in a tin box in the bank, the key being kept in the office of Earle & Co. James testifies that Morris D. Earle took charge of the securities for a time until he became sick and left, and then his brother, James Earle, took charge of the key and securities, and removed the box to the safe deposit company, where, as he testified, they were under his sole control, and afterward he removed them to his own office. By the silent acquiescence of both the appellant and Mrs. Earle, and with the knowledge of the appellant, the funds were permitted to be administered, first by Morris D. Earle and then by James Earle, under whose administration the losses appear to have occurred. These two sons appear to have constituted themselves agents of the executor and executrix and taken upon themselves the custody and management of the funds and securities of the estate, with the knowledge and implied consent of the appellant, who from time to time, at the request of James E. Earle, executed satisfaction-pieces of mortgages held by the estate, and suffered him to collect and invest the proceeds thereof. The appellant had the same control over these self-constituted agents as Mrs. Earle. It was equally his duty to supervise their action, and he was equally liable for their neglect or default. Funds going into their hands were not like funds collected by a co-executor, for a collection by such co-executor cannot ordinarily be prevented. He has the legal right and power to make collections. Such is not the case where a third party is suffered to manage the estate. The executors who permit such management adopt such party as their agent and are responsible for his conduct. But in the present case Mr. Earle would not have been justified in leaving the entire management in the hands even of the co-executrix, without supervision or inquiry, she being a female unacquainted with business, in feeble health, and whose time was engaged in the care of a large family of children, and he being an active business man, familiar with the values of prop-

erty and accustomed to making investments. He owed a duty to the infants whose property the testator had intrusted to his charge, to see so far as was in his power that it was not squandered or wasted by improvident and illegitimate investments. While an executor is not liable for acts of a co-executor which he has not the means of preventing or guarding against, or from which he has no reason to apprehend danger to the estate, he is still bound to some degree of watchfulness and care, even in respect to the acts of his co-executor or co-trustee. In this case none whatever appears to have been exercised, even over the sons who were permitted to assume the office of executors.

The appellant, as is found by the trial judge, did not take possession of any part of the funds of the estate, or give any direction about their investment, but wholly neglected to take any care or custody of such funds, or of the bonds and mortgages, and now professes to have acted upon the supposition that from the time of the accounting he was free from responsibility for the estate; but nevertheless he from time to time signed satisfaction-pieces and assignments of mortgages belonging to the estate, and the executrix did in like manner, and the proceeds were allowed to be collected first by Morris D. Earle until he was taken sick, and then by James Earle, who assumed charge and invested and reinvested the funds, sometimes in bonds secured by second mortgages, sometimes on unimproved property, and sometimes on property in New Jersey, which investments resulted in a large loss.

We think that the finding of the trial judge that after the removal of Charles B. Dodd, the three funds of \$74,741 09, \$106,772 95, and \$2,532 15, were within the control of the remaining executor and executrix, William P. Earle and Mary E. Earle, and his conclusion that they are jointly accountable therefor are well sustained by evidence and law.

A trustee should act in relation to a trust property with reasonable diligence, and in case of a joint trust he must exercise due caution and vigilance in respect to the approval of, and acquiescence in, the acts of his co-trustees, for if he should deliver over the whole management to others, and

betray supine indifference or gross negligence in regard to the interests of the *cestuis que trust*, he will be held responsible. (Story's Eq. Jur. § 1275; *Clark v. Clark*, 8 Paige, 153, 160.)

We think the evidence warranted a finding that the estate, was lost through negligence on the part of the executrix and the appellant, neither of them having paid any attention to its safety, and both having trusted blindly to the management of James Earle, and that the cause of the loss was his investments in second mortgages and mortgages on vacant lots, which were insufficient securities. And the evidence also warranted a finding that the appellant was aware that James Earle was investing on second mortgages. No detailed evidence was given of the losses, but the loss of the fund seems to have been assumed on the trial. James testified that the mortgages which he received when Morris D. left were paid off, the satisfaction-pieces being signed by the executor and executrix, or one of them; that as a general rule they were signed by both, but when there was a deviation from this it was a mere question of convenience whether he asked his mother or the appellant to sign the satisfaction-pieces. He, James, received the proceeds, deposited them to his own credit in the Union Trust Company, and reinvested them according to his own judgment, sometimes asking the appellant as to the value of the property mortgaged, but not going into particulars of the loans. He says that most of the second mortgages he took were cut off by the foreclosure of prior mortgages without being collected; two of them, second mortgages for large amounts, which were exceptionally good, he says were assigned to the appellant, who received from the mortgagor a shave of nine or ten per cent. The whole amount of these mortgages was paid to the estate and the proceeds were reinvested and subsequently lost. Some of the questions put to James Earle, on his cross-examination, assumed that the estate had been lost. They were not objected to, nor was the fact controverted. He says he has no doubt at all that he told the appellant of the money he was making by investments on second mortgages, and he has no recollection of the appellant ad-

vising against it. The appellant himself made investments on second mortgages through James Earle as his broker. The plaintiff testifies to a conversation between her mother and the appellant, in 1875 or 1876, in which he admitted that he knew that James was investing on second mortgages, and said that he supposed Mrs. Earle also knew it, and Mrs. Earle testified that in the same conversation she asked the appellant about the state of their affairs, and he told her that their money was gone through investments in second mortgages, and said that he had known for two years that James was investing money in second mortgages.

This evidence can and should be resorted to in support of the judgment, and sustains the findings and conclusions of the trial judge and the interlocutory judgment rendered by him.

In pursuance of the interlocutory judgment a referee was appointed to take the accounts therein directed, and several points arising on that reference have been urged on this appeal.

Among others the appellant proved that a large number of mortgages had been satisfied by satisfaction-pieces executed by Mrs. Earle alone, at the request of James, and delivered to him to enable him to receive the amounts due on the mortgages, and it was claimed that this was equivalent to a receipt of the money by Mrs. Earle, and committing it to James to invest for the estate, and that she alone should be charged with these moneys. This question had already been passed upon by the interlocutory judgment, and that had adjudged that the appellant and Mrs. Earle were jointly accountable for the whole funds found by the surrogate's decree to be in the hands of the executor and executrix, and that they were not to be credited with any loss caused by the action of James Earle in dealing with said funds, or credited with any investments of the same, except where such investments were of a character which the referee should approve; and that they were not to be credited with any loss which resulted from their neglect to keep and invest said funds. This adjudication was founded on the facts before referred to, and the evidence in the case which established that the appellant was cognizant of the fact that James Earle was intrusted with the management and invest-

ment of the funds, and acquiesced in such management by him, and that both he and Mrs. Earle executed satisfaction-pieces whenever requested by him, he sometimes executing them alone, thus in effect constituting him their common agent. This fact had already been found and was established in the case, and the referee was charged with the duty only of taking the account on the basis of the judgment. It was, therefore, immaterial to the matters before the referee whether the satisfaction-pieces were executed by Mrs. Earle or by the appellant. It was the appellant's duty to look after and supervise the management of James Earle, and his neglect to do so rendered him responsible. This responsibility had been adjudged, and the question could not be retried before the referee appointed to take the account.

It is further claimed by the appellant that the referee erred in sustaining the objections of the plaintiff and other legatees, to the accounts submitted by him. These accounts were not in conformity with the practice, and were not accompanied by any vouchers, and were unverified. Under the circumstances it may have been impracticable for the appellant to render an account in strict conformity with the practice, but, we think, substantial justice was done in this respect. It appeared that after the death of the testator, his seven children resided with their mother, and the family expenses were paid out of the common fund. The account submitted by the appellant was substantially a copy of the books kept by James Earle, and in this account were various charges for family expenses, running through a period of nearly eighteen years. The aggregate amount of the items in the account which appear to be for family expenses, schooling, medical services or articles of dress, was admitted by each of the four legatees in whose favor judgment has been rendered in this action, to be \$95,000, and they consented to be charged each with one-seventh of this amount or at that rate during the period they were maintained at the joint expense, with interest, making annual rests, and in pursuance of such consents they were charged by the referee with the following sums, including interest, viz.: The plaintiff was charged with \$23,092, the defendant Ellen F. Flagg, with

\$19,354 50, the defendant Charles Earle, with \$22,871, and the administrator of Mary E. Jardine, deceased, with \$17,689 95, for their proportions of the said family expenses and interest thereon, and these sums were deducted from the amounts for which the appellant was made accountable by the interlocutory judgment.

In view of the fact that he had presented no account making any specific charge against either of these four legatees for their maintenance, and had given no proof of the amount expended therefor, we think this result is quite favorable to him. He claims that he offered proof in support of his account, which was excluded, but on examining the case it appears that his offer to produce testimony was general. That it was objected that this offer was indefinite, that it was improper until a further account should be produced, and that he should not make a mere offer, but should call a witness or offer some evidence. These objections were sustained and thereupon the counsel for the appellant asked an adjournment to enable him to call the appellant on his own behalf and to offer any other testimony. The adjournment was granted and on the adjourned day the counsel for the appellant stated that he had no witness and nothing further to offer under the rulings of the referee, and he thereupon rested his case, and the counsel for the four legatees thereupon presented the consents before referred to, by which they consented to be charged with their proportions of the family expenses.

Thus far we find no error in the judgment and proceedings, but we think that there was error in the disposition made of the \$74,741 09, of which Mrs. Earle was entitled to the income during her life. This was treated as a fund in the hands of the appellant, and he was directed to pay one-seventh part thereof into the U. S. Trust Company, for each of the four legatees who have recovered, the principal to be paid to them respectively on the death of Mrs. Earle, and the interest to be paid to her in the meantime.

This, we think was erroneous. The fund was not, and never had been, in the hands of the appellant, but was assumed to have been lost by negligence, for which Mrs. Earle was, at

least, equally chargeable with the appellant. She should not be permitted to recover of her co-trustee or to compel him to provide a fund to replace that which had been lost by her own fault as much as his. She was equally liable with him for the whole recovery and must contribute toward her proportion of it, the income of the fund which should have been set apart for her benefit. No interest, therefore, should be paid to her or charged against the appellant with respect to this fund. All that he is bound to do is to answer jointly with her to the legatees, who will be entitled to receive it when she dies, for the principal of the fund, and it is not payable until that time. It would be oppressive to compel him to deposit the principal presently, and simply receive the small rate of interest which would be allowed by a trust company during the residue of the life of Mrs. Earle. If he can give adequate security to each of the four legatees, by mortgage on unincumbered real estate, for the payment of their shares of the principal, without interest, at the death of Mrs. Earle, we think that would be the most appropriate way of adjusting the matter.

The judgment should be affirmed, except as to the direction to pay into the U. S. Trust Company the four sums of \$11,677 41 each, and that should be modified by directing that in lieu of such deposit the appellant may give to the plaintiff and to the defendants Ellen Flagg, Charles Earle and John Jardine, administrator, etc., of Mary E. Jardine, deceased, his bonds for \$11,677 41, each, payable at the death of Mrs. Mary E. Earle, without interest, secured by a mortgage on unincumbered real estate in the State of New York, of sufficient value, to be approved by one of the judges of the Superior Court of the city of New York. If such bond is given, Mary E. Earle should be required and ordered to join therein as one of the obligors. So much of the judgment as directs that the interest on said sums be paid to Mrs. Mary E. Earle during her life is reversed, and, as thus modified, the judgment is affirmed without costs to either party in this court.

All concur.

Judgment accordingly.

HENDERSON vs. BLACKBURN.

[104 Illinois, 227.]

GIFT FOR LIFE WITH RIGHT TO USE.—REMAINDER OVER.

A devise by testator of all his real and personal estate to his wife, "to have and to hold or to dispose of so much of the same as she may need or wish to use during her lifetime, and after her death, if there is anything left," the same to be divided amongst certain persons, creates a general power of disposal not limited to the life estate, to be exercised only to the extent of her need.

APPEAL from the Circuit Court of Clark county.

Action of ejectment in which defendant recovered judgment and plaintiff appeals.

Golden & Wilkin, for appellant.

S. S. Whitehead, for appellee.

SHELDON, J. The controversy in this case is upon the construction of the second and third clauses of the will of Julius H. Blackburn—what, thereunder, was the power of disposition of the real estate devised, which was given to the widow, Polly Blackburn?

It appears to be the quite well settled doctrine that where a power of disposal accompanies a bequest or devise of a life estate, the power of disposal is only co-extensive with the estate, which the devisee takes under the will, and means such disposal as a tenant for life could make, unless there are other words clearly indicating that a larger power was intended. (*Bradley v. Westcott*, 13 Ves. 445; *Smith v. Bell*, 6 Pet. 68; *Boyd v. Strahan*, 36 Ill. 355; *Siegwald v. Siegwald*, 37 Id. 430; *Mulberry v. Mulberry*, 50 Id. 67; *Brant v. Virginia Coal and Iron Co.* 93 U. S. 326; *Giles v. Little*, 104 U. S. 291.) This doctrine is relied upon in favor of the appellant, it being insisted that it was a life estate which was here devised to the widow, and that the power of disposal which was given to her was such disposal only as a tenant for life could make.

There was not here a devise of an estate for life in express terms, but the devise was, "to have and to hold, or to dispose of so much of the same as she may need or wish to use during her lifetime." The power being given to dispose of so much of the property as she might need or wish to use during her lifetime, we cannot doubt that had the widow needed all this property for her support during her lifetime, she might have disposed of the whole of it for such purpose, the power to do so being given in express terms. The form of the power of disposal given in this case being "of so much of the property as the widow might need or wish to use during her lifetime," excludes the idea that it was only a life interest which she might dispose of, and plainly intends the power of disposition of the whole interest in the property for the purpose named.

The words in the third clause of the will, "and after her death, if there is anything left," imply a power of disposition by the widow of the whole property devised. There are cases which hold where, by will, there is given a life estate in real and personal property, and there is a devise over in somewhat similar phrase as the above, as in *Siegwald v. Siegwald*, "what may be left," in *Green v. Hewitt*, 97 Ill. 113, and *Giles v. Little*, above, "or whatever remains," that those words are to be limited to the personal estate, and do not apply to the real estate; or, as in *Blanchard v. Blanchard*, 1 Allen, 223, that the words meant the property left after the life estate had terminated. But the words here used, "if there is anything left," do not admit of such construction. These words imply that there might not be anything whatever left of either real or personal property, they expressing a doubt whether there would be anything left after the death of the widow, showing that it was then in the contemplation of the testator that the widow might dispose of the entire interest in the real property, leaving nothing, and thus that he intended she should have such power of disposition.

In the recent case of *Clark et al. v. Middlesworth* (Sup. Ct. Ind.), it was held, where the language of a devise was "all my property, real and personal, to my wife, Mary A. Clark, dur-

ing her life, and at her death, should anything remain, the same to be divided among my heirs at law," that this was a devise of a life estate, coupled with a power of alienation: that such power was given the widow by the clearest implication, by the words, "and at her death, should anything remain." (And see *Paine v. Barnes*, 100 Mass. 470.)

We find in the will under consideration, the words which we have adverted to clearly indicating that a larger power of disposal was intended to be given by the will than that of a life estate, a power of disposal of the fee, and hence that the case does not come within the doctrine relied upon limiting the right of disposition to the life estate, where there is a power of disposal accompanying a devise of a life estate.

But although we find that by this will there was given to the widow the power of disposition in fee of the real estate devised, yet it was not an absolute power of disposal which was given,—it was a power only "to dispose of so much of the same as she may need or wish to use during her lifetime." The power of disposition was limited to the need and personal use of the widow. For such purpose she might dispose of the property, but not for any other purpose. Does the deed in question, of the widow to William Blackburn, come within the limit of the power as a disposition of the property for the widow's own need and personal use, or for another and different purpose, and so not authorized by the power given by the will? We are inclined to view this deed in the latter light. By the deed itself, instead of disposing of the property to meet any need or personal use of the widow herself, the property is expressly retained for her use and enjoyment so long as she lives, and it is not until her death that the deed is to take effect. The purport of the instrument is to dispose of the use and enjoyment of the property after her death—to be in reality for the benefit of the grantee, rather than to meet the requirement of any need or use of the grantor. Upon its face the deed appears to us to be in substantial effect in the nature of a testamentary disposition in favor of William Blackburn, the grantee. Clearly, the widow was not authorized by the will to make a devise of the land.

The minor requirements which the deed contains looking to the interest of the grantor, as, that the grantee shall attend to the property, keep it in repair, and attend to the wants generally of the grantor, we do not regard as sufficient to stamp the object of the deed as for the need and personal use of the grantor. It still appears to us to bear the character of a conveyance made in the interest and for the benefit of William H. Blackburn, rather than a disposition of the property, as contemplated by the will, for the need and personal use of the widow, and not to be a fair execution of the power which was conferred by the will. It follows that the instructions of the court below to the jury, that the will vested Mrs. Blackburn with full ownership of the land devised, and that her deed to William Blackburn conveyed to him the perfect title of the land, were erroneous.

The court excluded proof which was offered on the trial, that at the time the testator made his will his wife was about eighty-five or ninety years old; that he owned and resided on a farm of two hundred acres of land, over one hundred acres in cultivation, worth an annual rental of at least three dollars per acre; that he owned personal property of the value of \$4,000 or \$5,000, mostly interest-bearing notes; that he owned and possessed all said property at his death, in January, 1869; that his widow continued to reside on the homestead until her death, and that there was paid to her in June, 1871, on a final settlement of her husband's estate, nearly \$2,000, in money. We think this testimony might properly have been received as bearing upon the question whether the disposition of the land was needed for the support of the widow, or was, in truth, made for her personal use.

The judgment will be reversed, and the cause remanded.

Judgment reversed.

Mr. Justice SCHOLFIELD took no part.

ESTATE OF RAND.

[61 California, 468.]

OLOGRAPHIC WILL.—PARTLY WRITTEN, PARTLY PRINTED.

A paper printed in the form of a stationer's blank, with the vacant spaces filled in deceased's handwriting, is not an olographic will in whole or in part.

PROCEEDINGS to revoke the will of Cyrus A. Pomeroy.

Pillsbury & Titus and *J. B. Crockett*, for appellants.

Gray & Haven, for respondent.

THE COURT. A paper, of which the following is a copy, was admitted to probate as an olographic will, viz.:

"In the name of God. Amen.

"I, Augustus C. Rand, of the City and County of San Francisco, State of California, of the age of seventy-six years, and being of sound and disposing mind, and not under any restraint or the influence or representation of any person whatever, do make, publish, and declare this my last will and testament in manner following, that is to say:

"First. I direct that my body be decently buried, without undue ceremony or ostentation, but with proper regard to my station and condition in life and the circumstances of my estate.

"Secondly. I direct that my executor, hereinafter named, as soon as he has sufficient funds in his hands, pay my funeral expenses and the expenses of my last sickness.

"Thirdly. I will and bequeath to Mary Ann Babcock, wife of George Babcock, of Oakland, County of Alameda, State of California, all the right, title, and interest belonging to me in a piece of real estate situate in Brooklyn Township, County of Alameda, State of California, being known as the McCracken ranch, consisting of about sixty-five (65) acres, together with all the improvements and additions that I have made thereunto.

"Also, all my right, title, and interest in a house and lot in the City and County of San Francisco and State of California, known as No. 9 Second avenue, with all the improvements and appurtenances thereunto belonging.

"*Lastly. I hereby appoint George Babcock, of Oakland, County of Alameda and State of California, the executor of this my last will and testament, hereby revoking all former wills by me made.*

"*In witness whereof, I have hereunto set my hand and seal this twentieth day of October, in the year of our Lord one thousand eight hundred and seventy-seven.*

"AUGUSTUS C. RAND.

"*The foregoing instrument, consisting of — pages besides this, was, at the date thereof, by the said — signed and sealed and published as and declared to be — last will and testament, in presence of us, who, at — request, and in — presence and in presence of each other, have subscribed our names as witnesses thereto.*

" ———

"*Residing at —*

" ———

"*Residing at —*"

The portions of the paper in italic were printed in the form of a stationer's blank, and the portions in roman letters were in the handwriting of the deceased, filling the vacant spaces therein. In due time an heir of the deceased moved for revocation of the probate, on the ground that the paper was not an olographic will, it not being entirely in the handwriting of the deceased, and the court granted the motion. The section of the Civil Code referring to this subject, section 1277, is as follows:

"An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this State, and need not be witnessed."

The paper before us was not entirely written by the hand of the deceased. Portions of it were printed. The legisla-

ture has seen fit to prescribe forms requisite to an olographic will, and these forms are made necessary to be observed. It was strenuously urged before us that the portions of the paper which were written by the deceased should be admitted to probate, omitting the printed portions. We are not at liberty to so hold. We should, thereby, in effect, change the statute, and make it read that such portions of an instrument as are in the handwriting of the deceased constitute an olographic will. The instrument, in its entirety, is before us. It was not entirely written by the hand of the deceased.

Order affirmed.

HALSTEAD vs. HALL.

[60 Maryland, 209.]

"CHILDREN AND GRANDCHILDREN" AS WORDS OF LIMITATION.

In a devise to a person "for her own use during her life," and at her death to another, "to descend to his female children and grandchildren and to their heirs forever," the words children and grandchildren are words of limitation, and vest a remainder in fee in the children and such grandchildren only, as have no parents living, with a life estate existing in each of the first takers.

APPEAL from the Circuit Court for Anne Arundel County.

Action of ejectment.

John Ireland, and *William H. Tuck*, for appellant.

Frank H. Stockett, for appellee.

RETORHE, J. The determination of this appeal depends upon the construction to be given the following clause in the will of Mrs. Ann Lamden, under which the appellant claims to be entitled to an undivided one-fourth in the premises sued for:

"I will and bequeath unto my aunt, Miss Harriet Goldsmith, all the rest and residue of my estate, real and personal, for her own use during her life; at her death, I will and bequeath it to my cousin, Captain William Henry Gardner, to descend to his female children and grandchildren, and to their heirs forever."

The will was made in 1848, and the testatrix died in 1872. Both Miss Harriet Goldsmith and Captain William Henry Gardner died before the testatrix; the latter in 1871, and intestate, leaving two daughters, Mrs. Fannie A. Halstead and Mrs. McKnight, and two grand-daughters, to wit, Fannie F. Gardner, a daughter of Farragut Gardner, son of said Captain Gardner, who died in 1859, and the present plaintiff, born in the lifetime of Captain Gardner, who is the daughter of the said Mrs. Fannie A. Halstead, who is still alive.

Upon these facts, the appellant submitted a prayer, the substance of which is, that she took under the will an undivided one-fourth in the premises with her mother, Mrs. McKnight and Miss Gardner, they taking the other three-fourths, respectively. This prayer was rejected.

The appellee offered three prayers: the first submitting that under the said devise Captain Gardner took a vested estate in fee in the remainder in the real estate, the subject of the suit, which on the death of the testatrix descended to his heirs at law, of whom the plaintiff is not one, and, therefore, not entitled to recover; the second, that Captain Gardner took an estate tail female general in the real estate mentioned, which on the death of the testatrix, under the statute law of this State, descended to his heirs at law, of which the plaintiff is not one, and, therefore, is not entitled to recover. Both these prayers were rejected.

His third prayer contains the proposition that the plaintiff took no interest in or claim to the real estate in suit, under said devise, because her mother, the said Mrs. Halstead, one of the daughters of said Captain Gardner, was living at the time of the death of the said testatrix, and is still alive. This prayer was granted.

The case having been submitted to and tried by the court, the finding and judgment were for the defendant.

After full consideration of the clause in the will of Mrs. Lamden, before us for construction, we have reached the conclusion that the devise is to Miss Goldsmith for life, remainder to Captain Gardner for life, with remainder in fee to his female children and grandchildren.

That Captain Gardner did not take the fee, or an estate tail, as contended for by the appellee, seems clear from the explicit declaration of the testatrix, that the property first given to Miss Goldsmith for life, and at her death to Captain Gardner, is "to *descend* to his female *children and grandchildren*, and to *their* heirs forever." She uses the terms *children and grandchildren*, and not the term *heirs*, words which are, in their usual sense, words of *purchase* and not of *limitation*, and are to be always so regarded unless the testator has unmistakably used them otherwise, which is not the case here. (*Stump et al. v. Jordan et al.* 54 Md. 631; *In re Sanders and others*, 4 Paige's C. 293; 2 Wash. on Real Prop. (4th ed.) 603.)

That these words were not employed as words of limitation is further apparent because the words to carry the fee—"their heirs forever"—are explicitly grafted on the estate to descend to the children and grandchildren, and do not relate or apply to the interest devised to Captain Gardner. In *Shreve et al. v. Shreve et al.* 43 Md. 399, even the words "heirs and assigns forever" were held not to operate as words of limitation, because corrected or explained by words which followed, that were irreconcilable with the notion of descent. In this case no apt words, nor, indeed, any whatever are employed to indicate an absolute estate in Captain Gardner, but are expressly reserved to describe that devised to the children and grandchildren. (See Lord Brougham in *Fethuston v. Fethuston*, 3 Clark & Finnelly, 75.) The use of so technical a word as "heir," in a will may be shown to have been used in another than its legal sense. (*Doe d. Winter v. Perratt*, 7 Scott's N. R. 26, 45, 61.)

That no absolute estate or interest was taken by Captain

Gardner, in contemplation of the statute of 1825, chap. 119 (*Art. 49, sec. 8, Rev. Code*), is evident, because it does "appear" from the context of the will, that "a less estate or interest" was devised to him; in the absence of which condition only the statute has application.

The use of the word "descend," taken in connection with the rest of the language of the devise, from all of which the intent of the testatrix is to be gathered, cannot be understood as meant to vest the fee, or create an estate tail in Captain Gardner, because inconsistent with the general intent to vest it, subject to the life interests mentioned, in his children and grandchildren, to do which apt and legal terms are employed.

The use of the word "descend" has, however, a material bearing in determining whether the term "grandchildren" was intended to embrace the children of the living children of Captain Gardner, as well as of the dead. If the child of a *living* daughter was intended to take, then the plaintiff is included in the term "grandchildren," and is entitled to maintain her action. But if not, she was properly nonsuited.

The use of the word "descend" in a will, it is said in *Dennett v. Dennett*, 40 N. H. 498, does not operate to work a descent in the legal, strict sense of the term, as inheritance is through operation of law; its employment, therefore, unless some other meaning is apparent, is to be taken as indicating the desire of the testator that his property shall follow the same channel into which the law would direct it. Giving it this effect in the present case, which seems to be a reasonable construction, in endeavoring, as we should do, to make all the language of the testatrix operative, the devise can only mean that the grandchildren only whose parents are dead, shall take with the living children. For only in case of the death of its parent can the grandchild become the heir at law of its grandfather, and take from him by descent. Property cannot "descend" from a grandparent to a grandchild whose parents are living.

And attributing this as the sense of the word in which the testatrix used it, this meaning comports with what would seem

to have been the natural and probable intention of Mrs. Lamden ; for even had she not adopted the word "descend," or it should be regarded as used in a popular sense of no higher import than to "pass" or to "go," we should still consider it a reasonable construction of her will, that in speaking of grandchildren she had in contemplation only those whose parents were dead. She evidently intended that upon the death of Captain Gardner, his heirs should become the absolute owners of her estate, subject only to the restriction that they should be of the female sex ; and it would be in conflict with this general mode of disposition to suppose she intended when specifying the daughters as those who were to share in the general division of her estate, that she intended the daughters of these daughters to share also independently of their mothers. No discrimination having been indicated as between the daughters, and they apparently being regarded with the same favor as objects of her bounty, it would not be in harmony with this attitude of the testatrix towards them and her property, to adopt a construction which would result in giving to one branch of Captain Gardner's family twice as much as either of the others would receive. No such unequal division of her property seems to have been contemplated. She evidently meant those grandchildren of Captain Gardner whose parents should be dead.

Upon what seems to us to be the true and reasonable interpretation of the will, the mother of the plaintiff (who was entitled to and has received her share under the will, as one of the two female children of Captain Gardner), being alive at the time of the decease of the testatrix, and being in fact still alive, the plaintiff took no interest or estate whatever under the said devise of the said Mrs. Lamden.

As we concur in the rulings of the Circuit Court, it follows that in our opinion the judgment below was properly rendered for the defendant.

Judgment affirmed.

BAIRD vs. BOUCHER.

[60 Mississippi, 326.]

“RENT” READ AS “REAL.”—EXECUTION OF POWER.

The word “real” may be substituted for “rent” where the latter is plainly a clerical error as in a bequest of “all my rent and personal property.”

Where a life-tenant with power to convey in fee executes such a conveyance which contains no explanation of the authority under which it is made, it will be presumed to be an exercise of the power.

PETITION to sell or divide real estate.

The questions presented arise upon the will of M. W. Fulford, deceased, the material portions of which read :

“As to my personal property I wish it to be disposed of in the following manner, to wit :

“I now will and bequeath to my loving wife, Nancy V. Fulford, during her natural life, all my rent and personal property which I now enjoy——.”

The opinion contains the completion of this clause.

McIntosh & Williams, for appellant.

A. Y. Harper, for appellees.

COOPER, J. The word “rent” in the will of M. W. Fulford was evidently written by a clerical error for “real.” The testator was disposing of his real and personal property, and the whole instrument demonstrates the fact that one word was by mistake written for the other. *Noscitur a sociis*.

By the will, which was admitted to probate in the year 1850, the testator gave to his wife, Nancy V. Fulford, a life estate in his real and personal property, “to use said property for the support of her and the heirs of our body, namely, Siby F. Fulford, Lucy E. Fulford, Mary R. Fulford, Sallie G. Fulford, the now living heirs of our body, and at the death of said Nancy V. all the then property, both real and personal, to be equally divided between the above named heirs, or as many of

them as are still living at the death of said Nancy V. Fulford. And should Nancy think best, at any time, to remove from where we now live, she is fully authorized to sell the land which I now reside upon." In April, 1874, the appellees, Mary A. and Lucy R. Boucher, *nee* Mary A. and Lucy R. Fulford, bought from their sister Siby S., then Mrs. Mixon, her interest in said land, and in May Mrs. Fulford, in consideration of the sum of sixteen hundred dollars, conveyed the land by deed, conveying a fee simple title, to said Mary A. and Lucy R. There is no reference in the deed to the power of sale conferred by the will, nor any recital of the fact that Mrs. Fulford then thought it best to remove from the premises; nor is there any evidence that she ever contemplated so doing, or ever after the conveyance, in fact, did so; on the contrary, the evidence shows that after the conveyance, when not visiting her other children, she resided on the premises. The husband of one of the grantees, who was the only witness examined, testified that she remained on the premises until her death, but as the guest of his wife, and after the execution of the deed never claimed or exercised ownership over the land.

Mrs. Fulford, by the will of her husband, had only a life estate in the land. By her conveyance she disposed of the fee simple. The rule is, that where one has both an estate in, and a power over, property, and does an act which may be referred either to the execution of the power, or the exercise of his rights as owner, it will be presumed that the act is done by reason of his ownership; but if a conveyance is made which cannot have full effect except by referring it to an execution of the power, though some estate would pass by reason of his ownership, yet because the conveyance can only have full effect by referring it to the power, this will be done. The illustration given by Sugden is that of one having a life estate in lands, and a power to lease for three lives. In such case, if a lease for the lives be made, and no reference is made to the power, it will, nevertheless, be held to be done by virtue of the power; for, though the lease would be good for the life of the lessor, by reason of his interest, still the lease being for a greater term can only have full effect as an execution of the

power. (1 Sugden on Pow. 414; *Andrews v. Brumfield*, 32 Miss. 107; *Yates v. Clarke*, 56 Miss. 212.) In this case Mrs. Fulford had only a life estate, while the deed purports to convey a fee simple. If, then, the conveyance be referred to the estate of the grantor it cannot have full effect, and, therefore, it must be intended as an execution of the power.

But Mrs. Fulford did not have a general and unrestricted power over the estate of the remaindermen; she was only authorized to sell it if, at any time, she should think it best to remove from the premises. We think the evidence not only fails to show the existence of the circumstances justifying the sale, but establishes that such contingency had not arisen. The widow had remained upon the premises for twenty-four years after the death of her husband, all her daughters had married, and one, or perhaps two of them, resided on the land. These facts, taken in connection with the relationship of the parties, the fact that it is shown by the record that only a few weeks before the execution of the deed the grantees therein had purchased from their sister, Mrs. Mixon, her interest in the property, the continued residence of Mrs. Fulford on the land after the sale, as the guest of the grantees, impel us to the conviction that the conveyance was not made in the *bona fide* exercise of power conferred by the will, but that it was an attempt on the part of the parties thereto to exclude the complainant from the benefit of the devise under the will of her father, by a pretended exercise of the power. The complainant was entitled to the relief prayed.

The decree is reversed, and the cause remanded for future proceedings in the cause in conformity with the views herein expressed.

Reformation of Wills.—It is not the province of a court of equity to reform a will. *Chambers v. Watson*, 56 Iowa, 676; *Sherwood v. Sherwood*, 45 Wisconsin, 357.

Nor will it eliminate a plainly intelligible term. *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674.

Extrinsic evidence cannot establish a provision shown to have been omitted by mistake, nor can any essential or vital part left blank be supplied. *Tucker v. Seaman's Aid Society*, 7 Metc. 205.

Obvious clerical errors appearing on the face of a will may be corrected. "And" may be read "or," and *vice versa*. Jackson v. Blonshaw, 11 Johns. 54; Ely v. Ely, 5 C. E. Gr. 44; s. p. 12 Id. 305; Reid v. Braithwaite, L. R. 11 Eq. Cas. 515; Carpenter v. Bouldin, 48 Maryland, 122; Holcomb v. Lake, 24 N. J. Law, 684; Sayward v. Sayward, 7 Greenleaf, 310; s. c. 22 Am. Dec. 191.

"May leave" may be read "may have." Dubois v. Ray, 35 N. Y. 162; s. p. Wilkinson v. Adam, 1 Ves. & B. 422; Heeney v. Brooklyn, etc., Society, 38 Barb. 360; also, L. R. 16 Eq. 239.

"Reviving" may be "surviving." Pond v. Bergh, 10 Paige, 140. See, also, Dexter v. Gardner, 7 Allen, 245.

An error in a date may be corrected. Goods of Thomson, L. R. 1 Pr. & M. 8; Refell v. Refell, Id. 139.

Where a codicil concluded with the words: "In all other respects I revoke my said will," the court refused to hear evidence that "revoke" should have been written "confirm." *In re Davy*, 5 Jur. (N. S.) 252; s. c. 1 Sw. & Tr. 262.

Where a fourth codicil revoked three previous codicils, and a fifth codicil purported to confirm "the four codicils," it was held that the words "the four codicils" should be read "the fourth codicil." Goods of Thomson, cited above.

"Fourth schedule" was, in like manner, held to mean "fifth schedule." Hart v. Tulk, 2 De G., M. & G. 300.

Where an executor, who was only twelve years old, was named in a will, the court refused to hear evidence that the testator meant the lad's father whose name was, excepting part of the middle name, the same as his son's. Goods of Peel, L. R. 2 Pr. & M. 46.

In the very common case of the misnomer of a corporation intended as a beneficiary, considerable latitude is allowed by the courts to effectuate the intention of the testator. The usage of the testator in speaking of the society he proposes to benefit, his ignorance of its true name and the common usage of the public in speaking of it, will be taken into account. The cases are very numerous. Lefevre v. Lefevre, 59 N. Y. 434; Charter v. Charter, L. R. 7 H. of L. 364; Howard v. Am. Peace Society, 49 Me. 297; The Trustees v. Peasley, 15 N. H. 317; Ayres v. Weed, 16 Conn. 290; Button v. Am. Tract Society, 23 Vermont, 349; Kilvert's Trust, L. R. 7 Ch. 170; s. p. L. R. 12 Eq. 183; Newall's Appeal, 24 Penn. St. 197; Mound v. McPhail, 10 Leigh, 199.

In the same way misnomer of a legatee or devisee, where it is clearly a mistake, may be corrected.

"My brother John" was held to mean "my brother James," where the testator had but one brother and his name was James. Connolly v. Parden, 1 Paige, 291.

"Phillis" has been shown to mean "Phillip." Tudor v. Terrol, 2 Dana, 49.

"Priscilla Picard" to mean "Paris Picard." Hart v. Marks, 4 Bradf. 161.

"Daniel" to mean "David." Jackson v. Stanley, 10 Johns. 183.

"Cornelia Thompson" to mean "Caroline Thomas." Thomas v. Stevens, 4 Johns. Ch. 607. See, also, Scanlan v. Wright, 18 Pick. 527; *Ex parte* Hornby, 2 Bradf. 420.

A draftsman's testimony as to his instructions to show mistake is generally excluded. Drake v. Drake, 8 H. of L. 178; Gillett v. Gane, L. R. 10 Eq. 29; Nunn's Trusts, L. R. 19 Eq. 381; Doe v. Roast, 11 Jur. 99; *Contra*, Wagner's Appeal, 43 Penn. St. 102; *Ex parte* Hornby, cited above; Tucker v. Seaman's Aid Society, cited above.

A probate bond filed in court without a seal, such an omission being an oversight and a mistake, will be treated in equity as though sealed. Probate Court v. May, 52 Vermont, 182.

The courts incline to reform other written instruments and to allow the corrections of mistakes therein, much more generally, and with far less technicality than in the case of wills. Meyer v. Lathrop, 78 N. Y. 315; Harvey v. United States, 13 Ct. of Claims, 323; Ranney v. McMullen, 5 Abb. N. C. 246; Snell v. Atlantic Ins. Co. 98 U. S. 85; Levy v. Ward, 33 La. Ann. 1033; Backus v. Jeffrey, 47 Mich. 127; Robbins v. Magee, 76 Indiana, 381; Breit v. Yeaton, 101 Illinois, 242; Boardman v. Taylor, 66 Georgia, 638.

These cases furnish interesting instances of such corrections, and serve to show how the courts treat mistakes in written instruments other than wills.

ROCKWELL vs. YOUNG.

[60 Maryland, 563.]

TITLE TO CHATTELS FROM EXECUTOR DE SON TORT.

Title to the personal estate of an intestate can only be transmitted through the instrumentality of letters of administration.

An executor *de son tort* cannot convey to a person not a creditor of the estate a title to personalty valid as against a subsequently appointed administrator.

A valid title cannot be obtained from such an executor by limitation as the statute does not run till the issuing of letters of administration.

A purchaser of chattels from an executor *de son tort* may plead payment of a purchase-money note to the legal administrator.

THE opinion states the facts.

James E. Ellegood, for appellant.

A. Hunter Boyd, for appellee.

MILLER, J. This action was brought in April, 1882, by the appellant against the appellee upon a promissory note for \$225 given by the defendant to the plaintiff, dated the 5th of March, 1881, and payable in six months. This note was given as part payment for four mules sold by the plaintiff to the defendant at its date. The case was submitted to the court below upon an agreed statement of facts, all errors in pleading being waived, and the court to draw such inferences from the facts stated as a jury could.

From the statement of facts it appears that Sharlet Rockwell, the plaintiff, is the widow of Solomon Rockwell, who, in the spring of 1874, purchased four mules from one Hassett, for \$690, but before fully paying for them died intestate in December, 1874. Upon his death his widow took possession of these mules and other property of her deceased husband, and proceeded to sell and dispose of all of it and to pay his debts. Hassett was paid \$379, the balance due him for the mules out of the proceeds of a \$500 note, which one Tice owed the deceased. The widow sold the mules to Young, the defendant, for \$450, and he paid her \$225 in cash, and gave her the note in suit upon which he subsequently paid \$25. Joel Charles was appointed administrator of the estate of Solomon Rockwell, by the Orphan's Court of Washington county, on the 5th of April, 1881 (no letters of administration having previously been granted to any one), and has never made any return of any assets of the deceased. When her husband died, Mrs. Rockwell resided in Washington county, and did so for two years thereafter, when she removed to the State of West Virginia, where she now resides. She never applied for letters of administration on her husband's estate, but never renounced her right to such letters. No summons was issued for her, nor was she otherwise notified to appear and take out letters, nor

was any one else notified or summoned for the purpose of administering on the estate. Charles, the administrator, died in September, 1882, but before his death the defendant paid to him \$200, the balance due on the note in suit, the said Charles having previously made demand upon him therefor, and threatened to take possession of the mules as administrator of Rockwell, unless the defendant did so pay. When he bought them he believed they were the property of Sharlet Rockwell, and did not know they had belonged to her husband.

Upon these facts the court below gave judgment in favor of the defendant, and from that judgment the plaintiff has appealed.

It is a general and familiar principle of law that in every sale of personal property there is an implied warranty of title by the vendor. (*Mockbee v. Gardner*, 2 H. & G. 176; *Osgood v. Lewis*, Id. 495; *Giese v. Thomas*, 7 H. & J. 460.) And it is an equally well settled general rule, in this State at least, that title to the personal estate of a decedent can be transmitted only through the instrumentality of letters of administration. (*Smith v. Wilson*, 17 Md. 460; *Cecil v. Clarke*, Id. 520; *Alexander v. Stewart*, 8 G. & J. 246.) The statement of facts shows that the plaintiff never took out letters of administration upon her husband's estate, and that the first grant of such letters was to Charles in April, 1881, a little more than six years after Rockwell's death. It has, however, been earnestly argued by her counsel, that the plaintiff by taking possession, and selling and disposing of all her husband's personal estate, and paying his debts, made herself his executrix *de son tort*, and that absolute title had vested in her by lapse of time or limitations, or if this be not so then that she held these mules as executrix *de son tort*, and that the sale of them by her *prior* to the grant of letters to Charles, passed a good title to the purchaser. But in so far as lapse of time or limitations are relied on as conferring, or aiding in conferring title upon the plaintiff, the authorities are too clear and decisive to be questioned. In the leading case of *Fishwick v. Sewell*, 4 H. & J. 393, nearly forty years elapsed before letters were granted, and the court held that limitations could

not begin to operate before the letters were taken out, and, therefore, constituted no bar to an action of trover brought by the administrator against the defendant who claimed the property under the will of a party who had taken possession of it immediately upon the death of the intestate. The law thus laid down in that case, which was decided in 1818, has been applied in every instance in which the same question has since arisen. (*Haslett v. Glenn*, 7 H. & J. 17; *Hagthorp v. Hook*, 1 G. & J. 276; *Donaldson v. Raborg*, 26 Md. 326; *Smith v. Dennis*, 33 Md. 442.) In the case last cited ejectment was brought by an administrator *de bonis non*, for leasehold property which had fallen into the estate after the termination of life estates created by will, and the court said, "as there has been no person in being capable of suing since the termination of the last life estate, until the grant of letters to the lessor of the plaintiff, the statute of limitations does not bar, although the holding of the defendant, and those under whom she claims, has been exclusive and by claim of right and title in themselves for more than twenty years since the termination of such life estate, and before the bringing of this action." With respect to the other contention the case does not require us to determine what acts or degree of intermeddling with the estate will make one an executor *de son tort*, nor to what extent such an executor may be made liable to creditors, or how far the law will protect him and recognize his acts as lawful when sued by creditors. The single question here is, can such an executor (assuming the appellant to be such) sell the chattels of a decedent and pass a good title to the purchaser as against the subsequently appointed lawful administrator, such purchaser not being a creditor of the estate, and not taking the property in discharge of any debt due him by the decedent? Our statute law gives a definite answer to this inquiry, if not by other provisions, certainly by the enactment that "no executor or administrator shall sell any property of his decedent without an order of the Orphan's Court granting the letters, being first had and obtained, authorizing such sale, and any sale made without an order of court previously had as aforesaid, shall be void, and no title shall pass thereby to the pur-

chaser." In the face of this enactment it is not to be tolerated for a moment that a wrongful intermeddler can be permitted to deal with and dispose of the estate in a mode expressly forbidden to the lawfully appointed executor or administrator. A sale which is void and passes no title if made by the latter cannot be valid and pass a good title when made by the former. But apart from this particular statute, and indeed prior to its enactment (Act of 1843, ch. 304), the decisions of the appellate court already cited, as well as the reasoning of the chancellor in *Hagthorp v. Hook*, 1 G. & J. 277, 278, to the effect that the appointment of an administrator, as the law requires, is indispensable to the derivation of title to a decedent's personal estate, compel us to the same conclusion. Indeed, if the position contended for by the appellant should be sustained by this court, our system of administration, so carefully regulated by law for the protection of all parties interested, would be practically subverted, and an "authorized scramble" for every estate worth contending for, substituted in its place.

But it is further argued, that an executor *de son tort* having title and disposing of that title, the purchaser takes it and cannot set up a breach of warranty until he has been ousted by some superior title or recovery at law had. It is true authorities are not wanting to sustain the proposition, that a purchaser of personal property cannot defeat a recovery for the price agreed to be paid, by showing that the property is owned by another, unless he has been ousted, or there has been a recovery by the true owner. In fact in *Case v. Hall*, 24 Wend. 10, Nelson, Ch. J., laid it down as law, that where the vendee relies upon the warranty of title express or implied there must be a recovery by the real owner before an action can be maintained, and that this is in the nature of an eviction, and is the *only evidence* of the breach of the contract in analogy to the case of covenants real. And in the more recent case of *Krumhaar v. Birch*, 83 Penn. 426, it was decided, that where the purchaser seeks to defend an action for the purchase-money on the ground of a breach of warranty, he must show an eviction or an involuntary loss of possession. To the same effect are

the cases of *Linton v. Porter*, 31 Ill. 107; *Gross v. Kieraki*, 41 Cal. 111, and no doubt other decisions announcing the same doctrine may be found. On the other hand, courts of equally high authority maintain the law to be, that if a chattel is sold to which the vendor has no title, the purchaser may maintain an action against him to recover damages therefor, though he has not been disturbed in his possession, holding that in such a case the breach occurs at the time of the sale, in analogy to a covenant in a deed against incumbrances which is broken as soon as the deed is delivered. (*Grose v. Hennessey*, 13 Allen, 389; *Perkins v. Whelan*, 116 Mass. 542; *Payne v. Rad-den*, 4 Bibb, 304; *Scott v. Scott*, 2 A. K. Marshall, 217; *Chancellor v. Wiggins*, 4 B. Monroe, 201.)

There has been no direct decision upon this precise point in Maryland, but it is not necessary in order to sustain the defense in the present case, to go the extent of adopting the law as laid down in the Massachusetts and Kentucky decisions. The statement of facts shows that the defendant "paid the amount due on the note in suit to Charles, the said Charles having previously made demand on him therefor and threatened to take possession of the mules, as administrator of Rockwell, unless he did so pay," and this payment is in our opinion a good defense to the action. In the case of *McGiffin v. Baird*, 62 N. Y. 329, the opinion is expressed that such a defense would be sustained, for the court say: "If the property is taken from the purchaser by title paramount, or if the purchaser is compelled to pay the true owner the value of the property, in either case it is a defense for the purchase-money. So if the vendee returns the property upon discovering the defect in title he may have an action on the implied warranty, and of course a defense to an action for the purchase price, in which case he assumes the *onus* of proving title in a third person; and upon the same principle, if for any reason it is impracticable or even undesirable to return the property, perhaps the purchaser may pay the claimant its value without legal proceedings and avail himself of it as a defense upon assuming the burden of establishing the validity of the claim." And in *O'Brien v. Jones*, 91 N. Y. 193, a case decided by the same court during the present year, this qualification of the rule as

laid down in *Case v. Hall*, is adopted without hesitation, the court saying, that when the vendee relies upon a breach of warranty of title express or implied "he must either restore the property to the true owner, or be prepared to prove its loss under compulsory proceedings, or the payment of money through judgment obtained against him, *or voluntarily in answer to a claim made*, and in that case must also affirmatively establish that the claimant was the true owner and that his vendor was without title." The same exception to the general rule is also recognized by Cooley, J., in *Estelle v. Peacock*, 48 Mich. 469, and in *Matheny v. Mason*, 73 Mo. 677, the point expressly decided was that a vendee who discovers his vendor had no title may, upon being threatened with suit by the true owner, pay him the price, and such payment will be a complete defense to an action by his vendor, provided he shows that the party he paid was in fact the true owner. There are also English cases very similar to the one before us. (*Dickenson v. Naul*, 4 Barn. & Adol. 638; *Allen v. Hopkins*, 13 Mees. & Wels. 94.) In the former an action was brought for the price of goods by an auctioneer employed by a supposed executrix to sell the property of the testator, but before the goods were paid for it appeared that another person was the real executrix, who gave notice of that fact and claimed payment of the money from the buyer, and he paid it, and it was held that the auctioneer could not afterwards maintain an action against the buyer, though the latter had expressly promised to pay on being allowed to take the goods away, which he did. The latter was an action for goods sold and delivered. The defendant pleaded as to part of the goods, that the plaintiff had sold them as executor of one John Allen, and that in point of fact he was not executor, but another was executor who demanded payment to him, and that defendant had paid him, the rightful executor, the money. Upon replication and issue a verdict was rendered for the defendant, and a motion was made to enter judgment for the plaintiff *non obstante veredicto*. Pollock, C. B., in delivering the judgment of the court, said: "In substance the plea is this—that the plaintiff had no title, except a pretended title that turned out not to be well founded. The plea states

that the person who really was entitled was the representative of the deceased whom the defendant had paid for the goods. The substance of the plea is that the defendant had paid the party to whom the goods belonged, and who would have been entitled to maintain an action of trover for the goods, if the right to them had not been satisfied by payment of the price agreed on between the defendant and the pretended executor. Upon principle it seemed that that would be undoubtedly a good defense, but the case of *Dickenson v. Naul* appears to us to be a direct authority for maintaining the doctrine (if indeed any authority need be cited for a proposition so plain) that if goods be sold by a person who is not the owner, and the owner be found out and be paid for these goods, the person who sold them under pretended authority has no right to call upon the defendant to pay him also."

The application of this doctrine to the present case is obvious. We have shown that the plaintiff had no title to these mules. The title to them vested absolutely in the administrator, Charles, and he could undoubtedly either have recovered them from the defendant by replevin or have sued him in trover for their conversion. He had already paid part of the purchase-money to the plaintiff who had no title, and what good reason can be assigned why he should not be permitted to pay the balance to the administrator, if he was willing to accept it, in order to preserve possession of the property and save himself from further possible loss? And what reason or justice would there be in allowing the plaintiff to recover from the defendant when he would be compelled to pay the same money, and possibly more, to the administrator for the same property? Would it be equitable or just to require the defendant to pay this money to the plaintiff, and, when compelled by the true owner to pay the same a second time, to take the chance of recovering it back from her in an action on the warranty? By allowing this defense there is certainly no injustice done to the plaintiff, for she has already received more than she is entitled to, and it would seem to be but sheer justice to hold, as we do, that payment made to the true owner,

under the demand and threat set out in the statement of facts, is sufficient to defeat this action.

It has also been argued that Charles had no right to the administration, and that the letters to him were irregularly and improperly granted. Assuming (but without intimating an opinion to that effect) that it is competent for the plaintiff to assail the validity of these letters in this action, we find nothing in the statement of facts to show that they were not granted in strict conformity with the requirements of the statute on this subject. The widow resided out of the State at the time they were granted, and therefore no notice to her was required. (Code, art. 93, sec. 33.) And it is not shown, nor is there anything in the statement of facts from which the inference can be drawn, that there was any other person entitled to administration before Charles, or that the court could not have granted him the letters in its discretion under art. 93, sec. 31.

Judgment affirmed.

MARTIN vs. RAILROAD.

[92 New York, 70.]

ADMINISTRATION WITH LIMITED POWERS.

A surrogate has power to issue letters of administration with limited powers, as with "authority to prosecute only, and not with power to collect or compromise."

APPEAL from a judgment of the general term of the first department, affirming a judgment, in plaintiff's favor, upon a verdict. Action to recover damages for negligence resulting in the death of plaintiff's intestate.

The defendant's counsel objected to the letters of adminis-

tration as invalid, and excepted to the ruling of the court admitting them in evidence.

John M. Scribner, for appellant.

Samuel Greenbaum, for respondent.

PER CURIAM. The letters of administration issued to the plaintiff in this case contained a limitation, which was written on the margin, limiting the power of the administratrix to prosecute only and not giving her power to collect or compromise.

The limitation referred to was not, at the time of granting the letters, expressly authorized by any statute of this State, but, with this exception, the letters were in the usual form of those issued to an administrator and conferred the usual powers granted to such officer for the purpose of enabling him to discharge the duties thereby imposed. There can be no question that, without such limitation, the letters issued were fully authorized and within the power of the surrogate to grant. That officer had jurisdiction over the person and the subject-matter, and unless he exceeded his authority there is no ground for insisting that the letters were unauthorized. They certainly contained sufficient to confer general authority and power over the assets of the deceased, and it is not clear upon what ground it can be claimed that the right to administer, which was thus conferred, can be disregarded and set at naught for the reason that the letters contained matter which was not within the scope of the surrogate's power. Such matter, we think, being unnecessary, may be regarded as surplusage, and the letters may be considered as if it had not constituted a part of or been incorporated in the same. If the matter objected to be stricken out then the letters are perfect and complete. Within well-settled rules we think they may be considered as if they contained no such limitation, and the objection taken to their validity cannot be upheld.

We are also of the opinion that the surrogate had full power and authority to issue the letters in question in the form in

which they were made out and that they were properly issued by him.

By 2 R. S. 220, the surrogate is vested with authority "to grant letters testamentary and of administration" and "to direct and control" and settle the accounts of executors and administrators. Although the Surrogate's Court is limited in its jurisdiction it by no means follows that the surrogate had no power to issue the letters in question; he acted strictly within his jurisdiction, and in granting the letters he did that which was directly within the scope of his powers and the line of his duties; the law does not direct what language shall be employed in letters issued by him or what precise powers or duties shall be laid down in the same; it does not prohibit letters in the form used in the case considered. The power being general for such a purpose the surrogate must be governed by established rules not inconsistent with the statutes relating to the organization of the Surrogate's Court. In all matters relating to estates the court proceeds in accordance with established usage as modified by statutory enactment. (Redf. Law and Practice, 43.)

In the English practice letters of administration are granted, limited to certain effects of the deceased, while the general administration is committed to another. Also, administration is sometimes granted in reference to a particular fund and to defend proceedings in chancery. (3 Redfield on Wills, 113.) There would seem to be no objection to intrusting to the surrogate the necessary powers in regard to the administration of estates, subject to such restrictions as may be imposed by statutory enactment. The statutes contain no restriction in regard to the right of the surrogate to issue letters in the form of those which were proven on the trial of this action; they empower the surrogate "to control and direct" administrators, and no sound reason exists why the surrogate, in the exercise of his authority, should not limit the application of the letters issued by him. We think it rests with him to say, in the exercise of his discretion, what powers should be conferred upon an administrator, and so long as he does not exceed the authority vested in him by law there is no valid ground for assuming

that the letters issued by him are unauthorized; he has kept himself within the letter and the spirit of the statute, already cited, which authorizes him "to direct and control." In this case he merely allowed the administratrix to institute the first steps to be taken for the collection of a claim which existed against the defendant. The law does not prevent or forbid him from issuing letters in the form which he followed; he therein limited the power of the administratrix instead of extending it. The extent of the surrogate's authority has been the subject of consideration in the Supreme Court of this State. In *Dubois v. Sands*, 43 Barb. 412, it was laid down that the Surrogate's Court can only exercise such power as the statute confers, yet the authority to do certain acts or to exert a certain degree of power need not be given in express words, but may fairly be inferred from the general language of the statute, or, if necessary to accomplish its object and to the just and useful exercise of the powers which are expressly given, it may be taken for granted. And in *Hartnett v. Wandell*, 60 N. Y. 353; 19 Am. Rep. 194, it is held that the statute regulating the mode of procedure in the Surrogate's Court, like all rules of justice, should be liberally construed in furtherance of justice.

The authorities cited and the principle applicable to the right of this officer to exercise his power fully justified the issuing of the letters in question in the form granted, and we think it was warranted by law. Even if it be conceded that the surrogate improperly limited the power of the administratrix, in the letters issued, the objection is one that cannot be raised collaterally in a suit by the administratrix and the letters cannot be held void. At most it was an irregularity which can only be made available by the parties in interest upon appeal from the surrogate's decision, and the defendant was not in a position to take advantage of the irregularity, by objecting upon the trial to the right of the administratrix to maintain the action and by a motion to dismiss the complaint on that ground.

As we have arrived at the conclusion that the letters of administration were valid, it is not necessary to consider the

other questions relating to the same which have been urged by the appellant's counsel. No other point is made which demands examination, and the judgment should be affirmed.

DANFORTH and FINCH, JJ., concur.

RUGEK, Ch. J., ANDREWS and RAPALLO, JJ., concur on the ground that the surrogate had power to place the limitation in the letters.

EARL, J., concurs on the ground that the limitation was at most an irregularity and did not render the letters void.

Judgment affirmed.

READ vs. WATKINS.

[11 B. J. Lea, 158.]

EXECUTORY DEVISE.—PRIOR ABSOLUTE GIFT OF SAME PROPERTY.

An executory devise of personal property will not be defeated by a prior absolute gift of the same chattels, there being no words giving an unlimited power to dispose of the same.

APPEAL from Brownsville Chancery Court.

H. W. Bond, A. T. McNeul and McCorry & Bond, for complainants.

R. W. Haywood and Smith & Collier, for defendants.

DEADERICK, C. J. In June, 1877, complainant filed this bill in the Chancery Court at Brownsville, for the purpose of having a construction of the will of his testator.

Testator departed this life in December, 1869, leaving a widow and eleven children, and a large real and personal estate. He had been twice married, and left living children, or their representatives, by each of his wives. He made and published his will in March, 1866, and added a codicil thereto, November 18, 1869. His widow died a few years after testator's death.

The first clause of the will is as follows: "I loan to my beloved wife, Elizabeth M. Read, during her natural life, the tract of land on which I now reside, containing about twelve hundred acres, and I give and bequeath to her all my household and kitchen furniture, plantation tools and implements, carpenter's tools, and all the stock of every description, such as horses, mules, hogs, cattle and sheep, and all the wagons, carts, pleasure carriages, rockaways and buggy; all the corn, wheat, fodder, oats, rye, flour, meal, etc., not heretofore disposed of to D. J. & J. H. Read."

The second clause is as follows: "I give and bequeath to my said wife, after the payment of my just debts (including any that I have, or may execute to any of my children), all my crops of cotton on hand, except the one-fifth of the crop of 1864, and the one-sixth of the crop of 1865, which belongs to my son, J. H. Read. I also give and bequeath to my beloved wife all moneys that I may have on hand, all my bonds or notes and moneys on deposit, if any."

Clauses three and four devise lands to his children.

The fifth clause provides: "After the death of my beloved wife, and after all her debts are paid, I devise, will and direct that the property, real and personal, of which she may die seized and possessed, including any moneys she may leave, shall be equally divided among all my children and representatives of my deceased children, to wit, * * * (naming them), the children of my deceased children, to represent their parents and take the share their parents would have taken if living."

The sixth clause provides, that should his wife give to any of his children, any part of the money or personal property he had given to her, such child or children should account for the same on the final division of his estate, as though made by himself. "So that part I may leave my wife may be equally divided among my said children."

The seventh clause directs his executor not to have a public sale of any property not disposed of by the will, but this request was not to extend to any property left by his wife.

The eighth clause and last appoints his executor, Jas. D. Read, the complainant.

The codicil confirms a conveyance of a tract of land made to his daughter by him, and which was purchased by him at sheriff's sale as the property of her husband, and she is to be charged for it \$1,800, to be deducted from her interest in his estate after his death and the death of his wife, when his estate is divided amongst his children.

The question submitted for determination of the chancellor, was whether the widow took under the will a life estate only in the personal property.

The chancellor held that she took under the first and second clauses of the will the absolute right to the personalty therein bequeathed her, and the defendants, children of the first marriage, have appealed to this court.

In the case of *Smith, Trustees v. Bell and Wife*, it was held that where the bequest was "to and for her own use and disposal absolutely, and after her decease to be for the use of Jesse Goodwin," that the wife of testator, the first taker, took an absolute estate, with unqualified power of disposition, which defeated the executory devise to said Jesse Goodwin. (M. & Y. 303; 10 Yer. 290; 1 Cold. 227.)

But in *Brown v. Hunt*, 12 Heis. 409, it is held "the power of disposition inconsistent with the devise over must be one given by the will, and not a mere incident at common law, to the estate given to the first taker." (5 Hum. 503; 1 Swan, 185.)

So that the ordinary words conveying the absolute title, will not, without superadded words giving unlimited power of disposition, defeat an executory devise.

Testator, in the fifth clause of his will, directs that all the property, real and personal, of which his wife may die possessed, including any money she may leave, shall be equally divided amongst all his children.

And the sixth clause provides that if his wife should give to any of his children any part of the property or money he had given her, it should be accounted for on the settlement of his estate.

Clause sixth does not contain an unlimited power of disposition of the property testator had given his wife, but may more

properly be regarded as a recognition of a power to make advancements to his children, and such a limited or special power, unless fully executed, would not defeat the limitation over.

In this will there is no such unqualified power of disposition, and the result is that the decree of the chancellor is erroneous, and must be reversed, and a decree entered here in conformity to this opinion, and the cause will be remanded for further proceedings. The costs of this court will be paid by the executor, Jas. D. Read, executor of Chas. L. Read, deceased, out of the assets in his hands.

PENN vs. GUGGENHEIMER.

[76 Virginia, 839.]

**ELECTION TO TAKE UNDER WILL.—DEVISE OF PROPERTY OWNED
IN PART BY DEVISEE.**

Where testator, owning one-third of a tract of land known as the "home place," the residue of which was vested in his wife, directed in his will that she should "retain the home place," and at her death it should go to his son, a case for election by the widow is presented.

Residence on the place for thirty years, payment of taxes and exercise of ownership over the entire property, show an election to take under the will, which cannot be disavowed.

ACTION to ascertain the interest of William J. Penn in land whereof Stuart B. Penn died seized, and to subject such interest to plaintiff's judgments against William J. Penn.

Stuart B. Penn died in 1857, intestate, and childless, his heirs being his brothers George and William, his sister Mrs. Mayo, and his mother.

The widow of Charles B. Penn never renounced his will, nor had dower assigned her, nor expressed any dissent from the provisions in the will from the time of her husband's death in 1849 until her answer in this suit in 1867, when she denied

that she had done anything to divest her of her ownership of two-thirds of the "home place."

The court below held that the widow of Charles B. Penn had elected to take under the will.

Edmund Pendleton, for Mrs. A. S. Penn.

J. H. H. Figgatt and *John J. Allen*, for plaintiffs.

G. W. & L. C. Hansbrough, for G. S. Penn and Mrs. Mayo.

STAPLES, J. The main question in this case turns upon the construction to be given to the will of Charles B. Penn, which was admitted to probate at the September term of the county court of Botetourt, in the year 1849. The testator, at the time of his death, was possessed of a valuable real and personal estate, which he devised and bequeathed to his wife, Mrs. Ann Penn, and to his four children. To his two sons, George S. Penn and William Penn, he gave severally a tract of land. To Mrs. Mayo, his married daughter, he gave certain real estate and a sum of ten thousand dollars in bank stock. To his wife, he bequeathed all his slaves, with the full confidence that she would make such disposition of them among his children as should be just and equitable, after retaining such of them as she might desire for her own use during her lifetime. His other personal estate he directed to be sold, and the balance remaining, after the payment of his debts, together with the proceeds of any real estate not specifically devised, he bequeathed to his wife, with the full confidence that she would divide it among his children as she might deem just and proper.

The third clause of the will, which gives rise to this controversy, is as follows:

"It is my will and desire that my wife shall retain the home place, and at her death it shall be the property of my son, Stuart B. Penn, which I hereby give to him, his heirs and assigns for ever."

The home place, thus mentioned by the testator, is a tract of about eight hundred and twenty acres—one-half of which,

known as the lower half, was the property of Mrs. Penn, devised to her by her father. She was also the owner of one-third of the upper half of the tract, derived by descent from her sisters.

The testator was entitled to two undivided thirds acquired by purchase in the upper half of the tract. So that his interest at the time of his death did not exceed one-third of the entire tract.

The first question arising under the clause already quoted is, whether the testator intended to dispose of the entire tract, or whether the will is to be construed as disposing merely of his undivided third.

If the former interpretation be the true one, it is conceded that it was incumbent upon Mrs. Penn, the widow, to make her election, and that she cannot claim both her own estate and the provision made for her by the will.

Before entering into a discussion of that question, it will be proper briefly to advert to some of the principles of law governing in such cases.

The doctrine of election is said to rest upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who asserts an interest under an instrument is bound to give full effect, as far as he can, to that instrument. Or, as it is sometimes expressed, he who accepts a benefit under a deed or will must adopt the contents of the whole instrument, conforming to all its provisions and relinquishing every right inconsistent with it.

In the terse language of Lord Rosslyn, in *Wilson v. Lord Townsend*, 2 Vesey, Jur. 697, "You cannot act; you cannot come forth to a court of justice claiming in repugnant rights. When you claim under a deed, you must claim under the whole deed together; you cannot take one clause and advise the court to shut their eyes against the rest. Suppose in a will a legacy is given to you by one clause; by another, an estate of which you are in the possession is given to another. While you hold that, you shall not claim the legacy." (Pomeroy's Eq. Jur. §§ 465, 466; Leading Cases in Equity, vol. I, part 1, 541, 547,

548; *Kinnard, Exor v. Williams*, 8 Leigh, 400; *Craig's Heirs v. Walthall*, 14 Gratt. 518; *Dixon v. McClure*, Ib. 540.) In order, however, to raise a case of election, it is well settled the intention on the part of the testator to give that which is not his own, must be clear and unmistakable. It must appear from language which is unequivocal, which leaves no room for doubt as to the testator's design. The necessity for an election can never arise from an uncertain or dubious interpretation of the clause of donation. (Pomeroy, 472; 2 Story's Eq. Jur. § 10.)

It is not necessary, however, that this intention should be expressly declared. The dispositions of the instrument, fairly and reasonably interpreted, may of themselves show a clear design on the part of the testator to bestow upon the devisee property which in fact belongs to another.

As in other cases, the intention may be gathered from the whole and every part of the instrument. The difficulty of ascertaining the testator's intent, it is said, is always much greater where he has a partial interest in the estate devised than where he undertakes to dispose of an estate in which he has no interest.

In the former case, the presumption is that he intended to dispose of that which he might properly dispose of, and nothing more; and this presumption will always prevail, unless the intention is clearly manifested by demonstration, plain or necessary implication on the part of the testator, to dispose of the whole estate, including the interest of third parties. Generally when the testator has an undivided interest in certain property, and he employs general words in disposing of it, as "all my lands," or "all my estate," no case of election arises from it; for it does not plainly appear that he meant to dispose of anything but what was strictly his own. (2 Story's Eq. Jur. § 1087; Pomeroy, § 489.)

A case of election does arise, however, when the testator, having an undivided or partial interest in an estate, devises it specifically, thus indicating a purpose to bestow it as an entirety. The rule on this subject is thus laid down in Pomeroy's Equity Jurisprudence, § 489. Where the testator pro-

poses to give the whole thing itself, using language which, by reasonable intention, must necessarily describe and define the whole *corpus* of the thing in which his *particular* interest exists as a distinct and identified piece of property, then an intention to bestow the whole, and not merely the testator's individual share, must be inferred, and a case for an election arises. This rule is mentioned and commented on by Judge Christian, in delivering the opinion of this court in *Gregory et al. v. Gates*, 30 Gratt. 83, to which I refer as authority for other views here announced.

Now, let us apply these principles to the case in hand. In the first place, there can be no doubt that the tract of land or estate in question was universally known and described as the "home place." It is so spoken of by all the witnesses, by the parties, and it was so denominated in all the pleadings. Mrs. Penn, in her answer, describes it as the "home place." She speaks of the upper half of the home place and the lower half of the home place.

It is scarcely to be supposed that the testator would term it differently from every other person; that he referred only to his partial interest of one-third when by universal consent, usage, and habit, the entire tract was known and recognized as the home place. His language is: "That my wife shall retain the home place, and at her death it (the home place) shall be the property of my son, Stuart B. Penn, which I hereby give him, his heirs and assigns forever." What gives some significance at least to this language is that the mansion house, occupied by the testator and his family for many years, was located, not upon the half in which the testator had an interest of two-thirds, but upon that portion exclusively owned by Mrs. Penn. It was this portion upon which the family resided that might with some propriety be termed the "home place," and not the two undivided thirds of one-half, constituting merely a part of the tract.

It was said in the argument before this court that the language of the clause now under consideration is different from the other clauses of the will. For example, that the testator when disposing of his own property invariably uses the words,

"I give and bequeath," whereas in the present instance he merely expresses the wish that his wife shall retain the home place.

This difference of phraseology grows out of the fact that the testator was carefully defining and limiting an estate to be enjoyed by his wife during her life, and the language used by him was such as he supposed would accomplish the object. He then proceeds to say that it is his will and desire at her death it (the home place) "shall be the property of my son, Stuart B. Penn, which I hereby give him, his heirs and assigns forever." It is impossible, by argument or illustration, to add to the force and perspicuity of this language. Nothing can be plainer, more direct and comprehensive. The cases of *Padbury v. Clark*, 2 Mac. & G. 298; *Howell v. Jenkins*, 2 John. & H. 706; *Grovenon v. Dunston*, 25 Beavan, 97; *Grissel v. Twinhoe*, L. Rev. 7 Eq. 291, 295; in which it was held that the devisee was bound to elect, are directly in point and conclusive of the question.

The other dispositions made by the testator confirm thoroughly this view of his intention. He gave to his son George S. Penn an estate worth about \$11,000; to his son William Penn, an estate of the value of \$14,000, and to Mrs. Mayo property worth \$12,000 or \$15,000.

The provision made for his wife was more than sufficient for her support and maintenance during her life, in the most comfortable and abundant manner. If, however, he designed that his son, Stuart B. Penn, should take the one-third of the home place, subject to the incumbrance of the life estate, the provision for him was wholly inadequate and disproportionate to the benefits conferred upon his other children. On the other hand, if the testator intended that the entire home place should be the property of his son, Stuart B. Penn, the period of his enjoyment would be postponed until the death of Mrs. Penn, and the value of the devise would be about equal to the provision for the other children.

I am, therefore, of opinion, that, by the plain terms of the will, Mrs. Penn was put to her election, and that she could not

and cannot choose both her own estate and the bequests made in her favor.

The next inquiry is, whether Mrs. Penn did, in fact, elect to claim under the will.

An election may be implied as well as expressed. Whether there has been an election must be determined upon the circumstances of each particular case, rather than upon any general principles. (1 Lead. Cases in Equity, 539, 571, 572.) It may be inferred from the conduct of the party, his acts, his omissions, and his mode of dealing with the property. Unequivocal acts of ownership, with knowledge of the right to elect, and not through a mistake with respect to the condition and value of the estate, will generally be deemed an election to take under the will. (Pomeroy, §§ 514, 515.) Lapse of time, although not of itself conclusive, yet, when connected with circumstances of enjoyment, may be decisive upon the question of election.

In *Adsit v. Adsit*, 2 John. C. R. 448, 451, Chancellor Kent said: "Taking possession of property under a will or other instrument, and exercising unequivocal acts of ownership over it for a long period of time, will amount to a binding election."

"Positive acts of acceptance or renunciation," says Mr. Justice Story, "may arise from long acquiescence, or from other circumstances of a stringent nature, and are not indispensable."

"Again," he says, "it may be necessary to consider whether he (the devisee) can restore other persons affected by his claim to the same situation as if the acts had not been performed or the acquiescence had not existed, and whether there has been such a lapse of time as ought to preclude the court from entering upon such inquiries upon its general doctrine of not entertaining suits upon stale demands or after long delays. (2 Story's Eq. Jur. §§ 1097-98.)

Where the election is once made by the party bound to elect, either expressly or impliedly, and with full knowledge of all the facts, it binds not only himself, but also all those parties who claim under him, his representatives and heirs. (Pomeroy, 516.)

Let us apply these principles to the case before us. Upon the death of the testator, in the year 1849, Mrs. Penn continued in the possession of the home place until the present time, a period of thirty years. It does not appear that she ever expressed any dissatisfaction with the provisions of the will till the filing of her answer in the cause in the year 1867. In the year 1850, the entire tract was entered upon the commissioner's books of the county and assessed with taxes in her name, as tenant for life. Whether this was done by her direction or not, it does not appear; it can scarcely be supposed she was ignorant of a fact disclosed on every tax-ticket paid by her.

It has been already stated that by the will testator's slaves were given to Mrs. Penn, in full confidence that she would make such disposition of them among his children as would be just and equitable, after retaining such proportion of them as she might desire for her own use during her life.

The residue of the real and personal estate was also given to her in trust for the benefit of the children. In the year 1850, not long after the testator's death, the executors turned over to her the entire personal estate, including slaves, and took her receipt stating that this was done in conformity with the provisions of the will. The executors must therefore have understood that Mrs. Penn had accepted the provision made for her benefit. Upon no other ground would they have been warranted in thus dealing with the assets. The terms of the receipt given by her show that she was perfectly apprized of the contents of the will; that she knew the condition and value of the property, and that she had united with the executors in fulfilling the intentions and wishes of the testator. Had Mrs. Penn renounced the will, as she was bound to do, in order to claim her own estate, she would have been entitled only to one-third of the slaves for life, and one-third of the personal property absolutely. As it was, she received from the executors under the will forty-nine slaves, of the value of \$18,370, and other property, worth between \$5,000 and \$6,000. The testimony shows that Mrs. Penn never made any formal division of the property; that she, however, distributed among her children about twelve of the slaves, retaining the residue

in her own possession, for her own use and benefit, until their emancipation in 1865. It is of no sort of consequence that during his lifetime Stuart B. Penn resided at the home place and managed and controlled all the operations of the estate. This was, of course, done by the authority of Mrs. Penn, and doubtless for the reason that it was more agreeable to her that one of her sons should relieve her of the trouble and responsibility, to which, amid the infirmities of declining years, she was unequal. She certainly exercised a dominion and ownership of the property to which she was entitled only under her husband's will, and which she could never have assumed unless she intended to conform to its provisions.

After this long lapse of time, after this long continued enjoyment and possession of the estate, and unequivocal recognition of the provisions of the will by receiving the property from the executors, it is too late for Mrs. Penn, at this day, to disclaim the testator's bounty and assert title to her own estate.

The slaves have long since been emancipated, the personal property exhausted, and it is now impossible to place the children in the condition they would have occupied had Mrs. Penn in the outset declared her intention to hold her own property.

So far from it, it is very clear that she made her election to *claim* under the will, and that she did so with a deliberate and intelligent choice, and with a full knowledge of all the circumstances, and of her own rights. No possible injury can accrue to any one from the conclusion thus reached, for Mrs. Penn lived and died in the enjoyment of the estate. She never attempted any other disposition of it.

Stuart B. Penn, the devisee, is dead, without children, and the estate has passed in due course of law to Mrs. Penn's children. A contrary decision can result only in disturbing a condition of things settled and acquiesced in for many years by all parties. I think, therefore, there is no error upon this branch of the case in the decision of the Circuit Court.

The learned counsel for the appellant, in his petition for an appeal, and in his argument before this court, has taken the

ground that the parties bringing this suit are neither heirs, nor purchasers, nor beneficiaries, under the will of Charles Penn, but judgment-creditors of William J. Penn, and as such intruders and volunteers, seeking to set aside a family settlement, and to vest in William J. Penn an interest which he himself does not claim, and to which he never asserted any title. It will not be denied that complainants, by virtue of their judgments, have a lien upon all the real estate of their debtor, and that under our statute they may enforce that lien in a court of equity.

This right of the complainants, and indeed of all judgment-creditors, cannot be affected by any omission of disclaimer on the part of the debtor. According to repeated decisions of this court, when the freehold has once vested, the owner cannot divest himself of the title by any mere parol disclaimer. But he can only do so by deed or some other act sufficient to pass an estate. Even had William J. Penn executed such deed, voluntarily relinquishing his title, his creditors would not be bound by it. When the court has once settled that Stuart B. Penn is entitled to the home place under the will of his father, William J. Penn, as one of his heirs, has an absolute title to his just share, or proportion of that estate, and his creditors may not only subject it to satisfaction of their debts, but they may resort to a court of equity for the purpose of ascertaining that interest, and of removing every obstacle in the way of the just enforcement of their liens. William J. Penn can no more defeat the claims of *his* creditors by a disclaimer of title than he could do so by a voluntary deed, or gift, or assignment.

In *Dold, Trustee v. Geiger's Adm'r*, 2 Gratt. 98, it was held that choses in action, to which the wife becomes entitled during coverture, are liable to the claims of the husband's creditors, and a voluntary relinquishment of the same by the husband, and the settlement upon the wife, before being reduced into possession, will not protect such choses in action from such creditors' claims.

Judge Stanard, in answer to an objection similar to the one made here, said : " I think it may safely be laid down as a just

deduction from the elementary principles of our law, that the general rule is that the rights of property of a debtor, whether in possession or in action, present or reversionary, in law or in equity, and of value adequate to pay his debts, and without which he is insolvent, and the payment of his debts must be frustrated, cannot, by the mere volition of the debtor, in the form of assignment, surrender, or other modes of arrest, pass to volunteers without valuable consideration, and be thereby placed in the hands of such volunteers, beyond the reach and secure from the claims of such creditors." This opinion of Judge Stauard, and indeed the decision itself, constitutes a complete answer to the points made by counsel, and render unnecessary any further discussion on the subject.

The next question is, whether the Circuit Court erred in disallowing the account of William J. Penn against the estate of Stuart B. Penn, for money alleged to have been paid by the former as administrator of Stuart B. Penn. The latter died in the year 1857, considerably indebted. William J. Penn qualified as his administrator, and removed to the home place, thereafter residing with his mother, the life-tenant. There is no doubt that the net income derived from the estate was appropriated by him to the payment of his brother's debts. The only question is, whether this income was sufficient for that purpose, or whether any part of the indebtedness was discharged by William J. Penn out of his private means. William J. Penn, in one of his depositions, states that from 1857 to 1860 he realized from the "home place" an income of \$6,196 15, all of which, by the direction of his mother, was applied to the payment of his brother's debts. He further states that Stuart B. Penn had a note in bank of \$4,600, for which the witness, at the request of his mother, substituted his own note. The larger portion of this latter note was paid off by him in February, 1864, and the balance in 1865, in Confederate money. This, reduced to its actual value in sound money, amounts to a very insignificant sum.

In the concluding part of William J. Penn's deposition, he expresses the opinion that he has been fully reimbursed for all moneys expended by him in the payment of his brother's

debts. Unfortunately for the parties setting up this claim, William J. Penn is their witness and their only witness. They cannot ask the court to discard their own testimony and enter a decree in their favor upon a case unsupported by proof. I have no doubt, however, that William J. Penn has given an accurate and truthful account of his transactions and dealings with the estate.

The home place was regarded as one of the most valuable estates on James river, yielding a large income annually to its owners. A very small portion of its profits was required for the support of Mrs. Penn; the balance passed into the hands of William J. Penn, and I am satisfied that he was fully reimbursed for every dollar appropriated by him for the payment of his brother's debts.

The complainants, after the fullest opportunity, have been unable to adduce any testimony to the contrary. They are clearly not entitled to a reversal of the decree in the present state of the case, and it is most apparent that nothing is to be gained by further inquiry.

Upon the whole, I think the decree of the Circuit Court should be affirmed.

Decree affirmed.

Election.—In order to raise a case of election on a testamentary instrument, the intention of the testator must clearly impose an obligation to elect. *Dillon v. Parker*, 1 C. & F. 303; *Cooper v. Cooper*, L. R. 7 H. L. 67; *Wood v. Wood*, 5 Paige, 601; *Fuller v. Yeates*, 8 Id. 325; *Waters v. Howard*, 1 Md. Ch. 112; *Boker v. Red*, 4 Dana, 160.

And this intention must be clearly expressed, or be necessarily implied from the provisions of the will. *Rancliffe v. Parkyns*, 6 Dow. 149; *Penn. Ins. Co. v. Stokes*, 61 Penn. St. 136; *Haston v. Cone*, 24 Ohio St. 11; *Apperson v. Bolton*, 29 Arkansas, 418; *Alling v. Chatfield*, 42 Conn. 276.

The doctrine of election is not properly a rule of positive law, but a rule of practice in equity. The knowledge of it is not therefore to be imputed as a matter of legal obligation. *Spread v. Morgan*, 11 H. L. Cases, 588; s. c. 13 L. T. (N. S.) 164.

In order to establish a case of election it must be shown that the person bound to elect has full knowledge of his rights, and acted with an intention to elect. *Wilson v. Thornbury*, 10 L. R. Ch. 289; 32 L. T. (N.

S.) 350; *United States v. Duncan*, 4 McLean's C. C. 99; *Tomlin v. Jayne*, 14 B. Mon. 162; *Kreiser's Appeal*, 69 Penn. St. 194.

Full mental capacity must also be shown. *Brown v. Hodgdon*, 31 Me. 65.

But that the testator, in disposing of that which is not his own, was aware of his want of title, need not be shown in order to raise a case of election. Whoever claims in opposition to such a will must not also claim what the will gives him. *Whistler v. Webster*, 2 Ves. Jr. 370; *Thellauson v. Woodford*, 18 Id. 221.

One is not precluded from claiming derivatively, through another, property which such other person has taken in opposition to the will. *Lady Cavan v. Pulteney*, 2 Ves. Jr. 544.

The same rule is found in the American cases. *Carder v. The Commissioner*, 16 Ohio St. 353; *Bowen v. Bowen*, 34 Id. 164; *Horton v. Mercier*, 31 Georgia, 325; *Crosthwaight v. Hutchinson*, 2 Bibb, 408.

If the property which the testator undertakes to dispose of belongs to several, as tenant for life and remainderman, or as tenants in common, each has a separate right of election. *Ward v. Baugh*, 4 Ves. 623; *Fytche v. Fytche*, L. R. 7 Eq. 494.

The principle of the doctrine of election is compensation, not forfeiture. *Pickersgill v. Rodger*, 5 L. R. Ch. Div. 163; *Lewis v. King*, 3 B. C. C. 600; *Welby v. Welby*, 2 Ves. & B. 190; *Jennings v. Jennings*, 21 Ohio St. 81; *Sandoll's Appeal*, 65 Penn. St. 314; *Key v. Griffin*, 1 Rich's Eq. 67.

The question when a widow will be put to her election, between her dower and the provision for her by her husband's will, is generally regulated in the United States by statute. It is in such a case as this that the matter of an election most often becomes material. The statutes are collected in 2 Scribner on Dower, § 110.

The statutory right to elect cannot be taken from the widow either by will or by deed of release executed by her to her husband during coverture. *Wilber v. Wilber*, 52 Wisconsin, 298; *Hardy v. Scoles*, 54 Id. 452.

In the following cases the widow is held to be put to her election:

By a devise of real and personal property for life. *Herbert v. Wren*, 7 Cranch, 370.

By a general devise. *Luigart v. Ripley*, 19 Ohio St. 24; *Shaw v. Shaw*, 2 Dana, 342.

By a mere legacy. *Timberlake v. Parish*, 5 Id. 352; *Wood v. Lee*, 5 Mon. 58; *Jennings v. Jennings*, 21 Ohio St. 56.

By a devise during widowhood. *Stark v. Hunton*, Saxt. 216.

By a devise with remainder over upon her death or remarriage. *Wilson v. Hayne*, 1 Chev. 47.

By any provision whatever. *Reid v. Campbell*, 1 Meigs, 378.

By any devise. *Gough v. Manning*, 26 Maryland, 347.

By any provision unless it clearly appear that the testator intended her to have both. *Young v. Pickens*, 49 Indiana, 28; *Ragsdale v. Parrish*, 74 Id. 191; *Smith v. Smith*, 76 Id. 236.

By a deed of settlement during coverture. *Taylor v. Browne*, 2 Leigh, 419; *Pickett v. Peay*, 2 S. C. Const. Rep. 746.

By a partition of the estate. *Orrick v. Robbins*, 34 Mo. 226.

Every man who owns real estate is held to know that his wife is entitled to dower. The law implies this knowledge. Hence the presumption is that where a testator bequeaths a legacy to his wife he intends it in addition to the legal provision of dower, unless he declares it to be in bar of dower, and she shall have both. *Whilden v. Whilden*, *Riley's Ch.* 205; *Metteer v. Wiley*, 34 Iowa, 214; *Collins v. Woods*, 63 Illinois, 285; *Dixon v. McCue*, 14 Gratt. 540; *Re Klostermann*, 6 Mo. App. 814.

Where A. devises all of his estate to his wife, she does not, by accepting under the will, forfeit her right of dower. *Potter v. Wormley*, 57 Iowa, 66. See, also, *Blair v. Wilson*, Id. 177; *McCormack v. McNeel*, 53 Texas, 15.

A testator gave to his wife all his real and personal estate. The estate proved insolvent. She was held to be entitled to dower and homestead without having formally dissented from the provisions of the will. *Jarman v. Jarman*, 4 Lea (Tenn.), 671.

Late English cases of value on the general subject of election are, *Mecke v. Devenish*, 47 L. J. Chan. Div. 57; *Roberts v. Gordon*, 37 L. T. (N. S.) 627.

HOPPE vs. BYERS.

[60 Maryland, 381.]

DECLARATIONS OF DECEASED UPON QUESTION OF FORGERY OF WILL.

Upon an issue of forgery *vel non*, after direct proof of the genuineness and spuriousness of the paper, declarations of deceased, corroborative of such proofs, may be offered by either party.

APPEAL from Washington county Circuit Court.

Charles B. Roberts and *Charles Marshall*, for appellants.

L. E. McComas, *Alexander Neill* and *Wm. P. Maulsby*,
for appellees.

MILLER, J.—The single issue transmitted for trial in this case was whether a certain paper-writing propounded for probate on the 19th of September, 1881, by Eliza Ann Byers, wife of John G. Byers, as the will or testament of John Henry Hoppe, was written or signed by him, or signed by some other person in his presence or by his express direction?

Mr. Hoppe died in January, 1881, at the age of eighty-one years, leaving personal estate valued at about \$127,000, and real estate worth about \$38,000. He left a widow and six grandchildren, children of a deceased son who had died in December, 1877, his sole heirs at law. It also appears from the record that Eliza Ann Byers, whose maiden name was Geatty, had lived with Mr. Hoppe in his family from early childhood until her marriage in 1853. In January, 1875, she and her husband resided near Littlestown, Penn., about fourteen miles from Westminster, where Mr. Hoppe lived, and on the 9th of that month he wrote a letter on one side of a half sheet of foolscap paper which was inclosed in an envelope addressed to John G. Byers, and was put in the post-office on the 11th of the same month. That letter is as follows:

“WESTMINSTER, Jan’y 9th, 1875.

“This is to inform you and your wife that John T. Diffenbaugh called on me and stated that your wife, Eliza Ann Byers *is* coming to her out of the estate of Anna Geatty, deceased, according to the first and final account thereof, settled by Andrew Reese Durbin, deceased, executor of said Anna Geatty, in the Orphan’s Court of Carroll County, Feb’y 10th, 1873, amount due Eliza Ann Byers, wife of John Byers, the sum of \$31.30. John T. Diffenbaugh, as executor of Andrew Reese Durbin, is about making settlement in the Orphan’s Court, of Durbin’s estate, of the funds in his hands to be distributed among the creditors of said deceased. I have posed a notice as you will see and read, as given in the newspapers in our town; you will give this notice your and your wife’s attention, for the purpose of getting your dividend, and I now propose to you, and your wife, to meet me in Taneytown, on Wednesday, the 13th of January, 1875, at the hotel of Elliott, in Taneytown, at 10 o’clock, A. M. On which day I have

a sale to cry for Isaac E. Pearson, trustee of David Sentz' property. I have prepared your claim for you to *sware* before me as Justice of the Peace, and when done, I will file your claim with the Register of the Orphan's Court, so you may get your dividend out of the estate of Durbin. By attending to this, will save you trouble and expense; I hope to see you at Taneytown on the day above named; we are all reasonably well; hoping these may find you all well.

"Yours in haste, respectfully,

"J. HENRY HOPPE.

"John G. Byers and Eliza Ann Byers."

This letter is admitted to be in the handwriting of Hoppe. At the bottom of the page and at the corner are the words "Turn over," and then on the reverse or opposite side of the same half sheet, is found the alleged testamentary writing as follows:

"Ann, don't worry yourself about this matter, as you see you are almost cut out on every side by your father and your mother, but you have been a faithful daughter to me, and have obeyed me, and you have seen a great deal of trouble; don't worry yourself, but take things easy, and do the best you can for the present. I have prospered, and have accumulated a great — of money together, and I intend to do what I please with it. And, Ann, after my death you are to have forty thousand dollars; this you are to have, will or no will; take care of this letter until my death. Ann, keep this to yourself.

"J. HENRY HOPPE.

"To Eliza Ann Byers."

The caveators, who are the widow, heirs at law, and administrators of Hoppe, insisted that all this writing, including the words "Turn over" on the first page of the letter, was an out and out forgery. At the trial of this one issue of forgery *vel non* the jury found a verdict for the caveatees, Byers and wife. In the course of the trial a single exception was taken by the caveators, and as counsel do not agree as to the question raised and presented for review by this exception, it becomes necessary to state it somewhat at length.

It appears then that the caveatees first offered in evidence the disputed instrument, and proved by a competent witness *that the same was in the handwriting of Hoppe*. The caveators then proved by Dr. Herring *that neither the paper nor the signature to it was in Hoppe's handwriting*. They then offered to prove by the same witness that in October, 1880, Hoppe said he would have to make a will, and was examining his papers with that view; that about two weeks before his death he sent for witness and said he was about to make his will and wanted Parke to write it when he got it arranged in his mind, and that he wanted witness and Longwell to be his executors. The caveatees objected to the admissibility of these declarations, when the court suggested that the question be reserved until it should appear whether any further, and if so, what declarations of the deceased would be offered on each side, when argument on the question of their admissibility would be heard, and the court would indicate its opinion, and any declarations on either side might be introduced in conformity therewith. In the further progress of the case and after the caveators had given testimony *by other witnesses to prove that this paper was not in the handwriting of Hoppe, and was not signed by him*, they offered to give in evidence other declarations of Hoppe, but the caveatees again objected. The court then requested counsel on either side to put in writing the declarations they proposed to offer, and announced that it would then give its opinion on the general question of the admissibility of such declarations. Thereupon, and in compliance with this suggestion, counsel for the caveators submitted a written statement showing that they proposed to prove the following declarations, all made since January, 1875, the date of the paper in dispute:

1st. By Dr. Herring, that a short time before his death, Hoppe stated to witness that he had not made any disposition of his property, but intended to make his will, and for that purpose had spoken to Mr. Parke, an attorney, to prepare a draft of his will, and that he had selected his executors.

2d. By Parke, that a short time before his death, Hoppe requested witness to prepare his will, and for purpose stated to

him the particular disposition he intended to make of his property, and that witness took down in writing the names of the beneficiaries, and the amounts stated to him by Hoppe; that these memoranda in writing were made by witness in the presence of Hoppe, and were, by witness, read over to him, and he said the same were correct; that subsequently witness had a conversation with Hoppe, who again stated what disposition he proposed to make of his property, and that on neither occasion, nor at any other time, did he mention the name of Eliza Ann Byers as one of the beneficiaries under his will; that by these instructions, he gave small sums to nearly all of his relations, and left the balance of his property to his widow and grandchildren.

3d. By various witnesses, that Hoppe stated, after the death of his son, he intended to leave his whole estate to his wife and grandchildren; that he frequently said, "who but my wife and grandchildren should inherit my property?" and that when his widow got her share, each of his grandchildren would have about \$25,000; and further to prove that this estimate would absorb the whole estate.

4th. By Mrs. Hoppe, the widow, that her husband told her a few days before his death, that he had made no disposition of his property, and that the law made for him the only will he wished; that she would get a good part of his property, and the balance would go to his grandchildren.

Counsel for the caveatees also submitted a written statement, by which they offered to prove:

1st. That just prior to the marriage of Eliza Ann, in 1853, Hoppe, whilst speaking of objections made by her father, Geatty, to her marriage, said she was *his* daughter, and he was able and would provide for her well, and that he did not care whether Geatty did anything for her or not.

2d. That in 1860, after her marriage, he expressed his strong affection for her, recapitulated her filial devotion and services to him, and that he intended to give her a child's share of his estate.

3d. That prior to the death of his son, he frequently complained of his son's wastefulness and want of economy, and

also that of his son's wife and children, and said they should not spend all the money he had saved; that he would give a child's share of his estate to Eliza Ann.

4th. Various other declarations made by him at various times, to the same substance and effect.

5th. That after the death of his son, he declared his son's children should not spend all his money after his death, in driving about in carriages; and that he had secured to Eliza Ann a share of his estate.

6th. That he declared he intended to give Eliza Ann a child's share of his estate, which would be about \$40,000; and that after the death of his son, he said to the same witness, that now he had done what he had said to witness he would do.

7th. That in 1880, he said he had secured a child's share, or a share of his estate, to Eliza Ann Byers.

Thereupon, after hearing argument, a majority of the judges before whom the case was tried, announced the opinion of the court to be that any declarations of Hoppe would be admissible, provided their character and nature were such as might throw light on the matter of probability, whether he had or had not written and signed the paper in question, and that counsel might proceed under this view, and as the case progressed the court would apply this view of the law to the particular declarations which might be offered on both sides. "And it was thereupon *understood and agreed*, upon both sides, that all such testimony be taken subject to exception, and *exceptions were to be understood as reserved* to all such proof of declarations by both sides."

The caveators then gave in evidence by several witnesses, declarations of the deceased substantially such as were stated in their written offer, and closed the case on their side. The caveatees then offered proof by other *witnesses, tending to show that the paper, as well as the signature thereto, was in the handwriting of the deceased*. They then proved, by a number of witnesses (whose testimony is set out in the exception), declarations of the deceased such as were stated in their written offer. "Thereupon, the caveators, under the *understanding*

and agreement hereinbefore mentioned, objected to the admissibility of all and each and every of the declarations of the said John Henry Hoppe hereinbefore set out as given in evidence by the caveatees, but the court overruled said exceptions and admitted said declarations, to which ruling of the court the caveators excepted."

From all this, it seems to us plain that it was the intention of the court, as well as of counsel on both sides, that the declarations referred to should be admitted subject to exception, and that either party should have the right, after they had been proved, to except to the admissibility of each and all of such declarations offered by the other, so that the question of their admissibility might be brought up for review. This, in our opinion, is the true and proper construction of the exception, and it follows that the question before us is, was there error in admitting any or all of the declarations offered and proved on the part of the caveatees?

The question, as thus presented, is a new one in this State. In the case of *Collins v. Elliott*, 1 H. & J. 1, all the attesting witnesses to the will were dead, and the declarations of the testator that he had made a will, and of the attesting witnesses that they had witnessed a will made by him, were offered in evidence by the party claiming title under the will, but the court held that such declarations could "not be received to establish the will," and that "proof of the handwriting of the testator and of all the witnesses was necessary" in order to let in the will as passing title to the land in controversy. In a subsequent ejectment for the same land, it appeared that two of the deceased witnesses were marksmen, and it was held that where witnesses have put their marks there must be proof that such marks are the marks of the witnesses. (*Collins and Wife v. Nicols and Wife*, 1 H. & J. 399.) In *Massey v. Massey*, 4 H. & J. 145, it was decided that the declarations of a testator to the effect that he believed he had destroyed his will, were not admissible for the purpose of proving a revocation. As to these propositions there can be no question. Neither the execution nor the revocation of a will can be proved by the mere parol declarations of the alleged testator that he had made, or

destroyed it, for that would be in direct conflict with the requirements of the statute on these subjects. Many of the authorities cited in argument go no further than this, and it is not necessary to notice them more particularly, as they have little or no bearing upon the question before us.

In the case of *Griffith v. Diffenderffer et al.* 50 Md. 467, the question arose how far and for what purpose such declarations were admissible under issues involving undue influence and fraud, and the court approved the doctrine which seems to be established by the current of modern decisions in this country, that declarations of a testator made after the execution of the will, and so remote as not to constitute part of the *res gestæ*, cannot be offered as independent evidence to prove the charge of fraud, or to show the *external acts* of undue influence or attempts to influence him to make a will in a particular direction, but are admissible to prove his mental condition and place him before the jury just as he was when the will was made, so that they could judge whether he had intelligence enough to detect the fraud, and strength of will enough to resist the influences brought to bear upon him, provided such declarations were made sufficiently near in time to justify a reasonable inference that the mental condition they are intended to indicate existed when the will was executed. In answer to the objection that such evidence may have an effect beyond that for which it can be legitimately offered, and though not competent to prove the *facts*, upon which the charges of fraud and undue influence are founded, they may nevertheless tend to bias or prejudice the jury, the court say, the same objection is applied also to other species of evidence which is competent for one purpose and not for another, and if it be admissible under the general rules of evidence it cannot be excluded on that ground. Applying this general doctrine to the case before them, the court held that declarations of the testatrix, made nearly a year *after* the date of the will, to the effect that she was dissatisfied with it, that she had been persuaded to make it, that she was sorry she had not let the law make a will for her so that her children would have fared alike, that she had done great injustice to her other children

and grandchildren, that she was troubled about it, was sometimes tempted to destroy the will, and other like declarations, were admissible for the purpose of proving her *mental condition* at the time of the execution of the will, but *for no other purpose*. This is a conclusive adjudication that such *subsequent* declarations, subject to the restriction, and to the extent and for the purpose thus indicated, are admissible under issues involving fraud and undue influence as well as testamentary capacity. In the same case declarations of the testatrix in regard to her testamentary intentions, made some months *before* the will and before any improper influences are supposed to have operated upon her, were also held to be admissible. "Evidence of this character," say the court, "may be offered either to rebut the charges of fraud and undue influence by showing that the will is consistent with the long cherished wishes of a testator, or that it is contrary to well settled convictions of what he thought was a just and proper disposition of his property among others standing in the same natural relation as those benefited by the will. The weight to be given to such testimony is a question for the jury."

But the questions thus decided are not exactly the same as that now before us. In that case (as indeed in most instances where there have been charges of fraud and undue influence) the genuineness of the instruments and of the decedent's signature thereto were admitted. The question whether, or to what extent such declarations are admissible upon a charge of *forgery* did not arise, and, in fact, we have found but very few cases in which such a question has arisen upon the single issue of *forgery vel non*. The only reported English case, brought to our notice by counsel, in which the question has been decided, is that of *Doe ex dem. Ellis v. Hardy*, 1 Moo. & Rob. 525. It was an action of ejectment. The lessor of the plaintiff claimed title under a codicil to a will, and the defense was that the alleged codicil was a forgery. The plaintiff, after giving other evidence, which was admitted without objection, offered declarations of the testator of his intention that the lessor of the plaintiff should have the property. They were objected to by the defendant, but Littledale, J.,

before whom the case was tried, overruled the objection and admitted them, saying: "I think the declarations of the testator are admissible to show his *intentions* where the defense is either fraud, circumvention or *forgery*." It is true this was simply a decision at a *nisi prius* trial, but, though made as long ago as 1836, it does not appear to have been overruled or questioned by any subsequent English authority. On the contrary the very language of the judge has been cited and adopted by the most eminent English text-writers on evidence and wills. (2 Taylor on Ev. § 1038; Roscoe's *Nisi Prius* Ev. [14th ed.] 57, 971; 1 Jarman on Wills [5th Amer. ed. from 4th Eng. ed.], 723. See, also, 1 Redfield on Wills [4th ed.], 511, note 4.)

But apart from direct authority on the subject, if declarations of a deceased party are admissible in any case, or to any extent, or for any purpose, where the validity of an instrument set up as his will is in controversy, why should they not be admitted in a case like the present? This paper, if it be testamentary in its character (a question not now to be decided), can be effective only as a will of personalty. It does not profess to pass real estate and was not attested by witnesses. There was no witness who could prove that he saw the deceased write or sign it. Proof as to his handwriting by witnesses acquainted with it, was the only *direct* testimony by which the genuineness of the instrument could be established or assailed. Such testimony was offered, and we infer from the record, that a large number of witnesses, and perhaps an equal number on each side, testified upon this subject, those for the caveators swearing that to the best of their knowledge and belief the writing was not, and those for the caveatees that it was, the handwriting of the decedent. The jury had also before them on the same paper the admittedly genuine part of the letter and were at liberty to compare this with the disputed writing. But in this state of case was no other evidence admissible? Were the jury bound to decide the issue and make up their verdict upon such testimony alone, and do the rules of evidence inexorably exclude from their consideration every other fact or circumstance that would tend to throw light upon the subject,

so as to render it probable or improbable that such a paper was ever written by the deceased, or in corroboration of the direct testimony as to handwriting given on either side? We think not. It must be admitted that testimony as to handwriting, in any case of alleged forgery, though the best the nature of the case admits of, is usually the most unsatisfactory species of evidence courts of justice have to deal with. It is matter of common experience in such cases that witnesses of equal honesty and character, and with equal means of knowledge, are found to testify both for and against the genuineness of the disputed signature. The difficulty and doubt are increased in a case like the present, where the instrument alleged to be forged is set up as a will which takes effect only after death, and where a forgery, if committed would surely, if ever, come to the knowledge of the party whose testament it purports or is said to be. It seems to us that in such a case every collateral fact and circumstance which is not clearly immaterial and irrelevant ought to be admitted, to aid the jury in reaching the *truth*, which after all is the object of every jury trial.

The relation which Mrs. Byers had occupied to the deceased, the feelings, whether friendly or otherwise, which, during his life, he manifested towards her, are facts which are certainly not immaterial or wholly irrelevant, and where such feelings have been manifested, as they usually are, by declarations made to intimate and confidential friends who are clear and positive in their statements of them, and especially when made under such circumstances as to show that they were earnest and sincere, we see no good reason why they should be excluded from the consideration of the jury. So again, and upon the same ground, his declarations made before the date of the disputed paper, to the effect that he intended to give her a share of his estate, followed by declarations made after that date to the effect that he had done what he had said he would do, and had secured to her, or given to her, a share of his estate, were, in our opinion, *admissible* in evidence. In such case the *time* when the declarations were made is of less importance than in cases where *mental condition*, at a particular period, is sought to be shown. Of course more or less

weight is attributable to them according as they were more or less remote from the date of the disputed writing, but their *admissibility* is not affected thereby. Entertaining this view of the law on the subject, we have carefully examined the declarations testified to by the several witnesses on the part of the caveators, and are of opinion they were each and all admissible. In this connection it is proper also to say that if the question were before us we should entertain no doubt as to the admissibility of the declarations offered on the part of the caveators, testified to by their witnesses as made after the date of the alleged testamentary paper.

But in thus sustaining the ruling excepted to, it must be distinctly understood that we hold that such declarations would not be admissible if they stood alone, and had not been *preceded* by the direct proof of witnesses as to the genuineness of the handwriting. They are not to be taken as direct proof to establish the paper, but merely as corroborative of such direct proof, or as a circumstance in a case of this character, where such direct evidence had been first given, proper for the consideration of the jury. Besides the English authorities referred to, we think the admission of such testimony under such circumstances, and for such purpose, is sustained by the majority of American cases, few as they are, in which this question has directly arisen, been considered and expressly decided. (*Turner v. Hand*, 3 Wallace, Jur. 92; *Taylor Will Case*, 10 Abbott's Pr. Rep. 300; *Johnson v. Brown*, 51 Texas Rep. 65; *Beadles v. Alexander*, 9 Baxter, Tenn. Rep. 604.)

Since the above was written our attention has been called to two recent English decisions which were not cited in argument. The first is *Sugden v. Lord St. Leonard*, Law Rep. 1 Prob. Div. 154, in which it was decided that declarations, written or oral, made by a testator both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents. The other is *Gould v. Lakes*, Law Rep. 6 Prob. Div. 1, where it was held that statements of a testator, whether made before or after the execution of the will, are admissible to show what papers constitute the will; and in delivering the judgment of the court in that

case, the president (Sir James Hannen) said: "In considering whether or no several pieces of paper constitute a will, evidence would be admissible to show that it was the intention of the testator to make dispositions in conformity with those found upon the several sheets of paper. The present question is whether these two papers were joined together, or were before the testatrix at the time she signed. But the question of law would not be different if the suggestion were that the first sheet was a forgery or an interpolation by somebody after the event. In such a case could it be said that in order to establish that this sheet was a genuine part of the will, evidence could not be given of a statement of the testatrix before she made the will, that she was going to dispose of her property in the manner in which it appears to be left in the paper alleged to have been interpolated? And in my opinion it is also the law that statements to the same effect subsequent to the making of the will would also be admissible to show what was the state of the testatrix's mind and intention, just as it would be an ingredient in the consideration whether or no a supposed interpolated sheet were a part of the will at the time of the execution." From this it would seem to be clear that the English judges of the present time would have no difficulty in holding the declarations of the decedent offered in evidence in this case, admissible.

The motion to dismiss is overruled. This is not an appeal from an order or decree of an Orphans' Court, which must be taken within thirty days from the date of the order, and the record transmitted within thirty days from the date of the appeal, as required by Rule 13 (29 Md. 6), but is an appeal from a "determination of a court of law," from which an appeal may be taken within nine months from its date, and the record transmitted within six months after the appeal, as provided by Rule 2 (29 Md. 1). Appeals from rulings of a court of law on a trial of issues sent from an Orphans' Court have always been treated as falling under the last cited rule, and under that the appeal and transmission of the record in this case were in time.

Ruling affirmed, and cause remanded.

BOWEN *vs.* SHAY.

[105 Illinois, 132.]

FAILURE TO TAKE SECURITY ON SALES FOR CREDIT.

An executor who omits to take security for property sold on credit, as required by statute, must make good to the estate loss resulting from a purchaser's insolvency.

APPEAL from the Court of the First District.

M. R. M. Wallace and *Charles L. Easton*, for appellant.

C. C. Kohlsaat and *G. L. Barber*, for appellees.

CRAIG, J. George S. Bowen, administrator (with the will annexed) of the estate of Jefferson B. Shay, deceased, presented his account to the Probate Court of Cook county for final settlement. Upon a hearing in the Probate Court all the items embraced in the account were approved and allowed, except one of \$7,019 58, which the court disallowed. From this order the administrator appealed to the Circuit Court, where the judgment of the Probate Court was affirmed. An appeal was then prosecuted to the appellate court, but the result was the same, and the administrator has appealed to this court.

In order to obtain a correct understanding of the decision of the Probate Court in disallowing appellant's claim, a brief reference to the facts seems necessary. During the progress of the administration, and before the sale of the personal property, the administrator became satisfied that certain property, consisting of a stock of goods, good will, etc., would sell much better at private sale. The administrator applied to the Probate Court, and obtained the following order:

"In the Matter of the Estate of Jefferson B. Shay, deceased:

"On petition of George S. Bowen, administrator (with the will annexed) of the estate of Jefferson B. Shay, deceased, it appearing to the court that it is necessary that the personal

property of said decedent, to wit: a retail stock of dry and fancy goods, store fixtures, and two truck horses and harness, described in the bill of appraisement on file in this court, be sold to pay the debts of said estate; it is therefore ordered by the court, that said administrator have leave, and he is hereby authorized, to sell the said personal property, goods, chattels and effects of said decedent at private sale, for the purpose aforesaid."

Under this order the administrator sold at private sale the property therein named to W. A. Shay, son of the decedent, and F. F. French, who were doing business under the name of Shay, French & Co., for the sum of \$28,903 78. There was paid in cash \$8,258 20, and the balance was upon a credit, for which the notes of the purchasers were taken, without security. Afterwards all of the purchase-money for the goods which was represented by the notes was paid, except the sum of \$7,019 58, and this became uncollectible on account of the insolvency of the purchasers, Shay, French & Co. Under these facts the question is whether the administrator should bear this loss, or whether it shall fall upon the estate.

Section 90, chap. 3, Rev. Stat. 1874, page 120, which has an important bearing on the question, declares: "When it is necessary for the proper administration of the estate, the executor or administrator shall, as soon as convenient after making the inventory and appraisement, sell at public sale all the personal property, goods and chattels of the decedent, when ordered to do so by the county court (not reserved to the widow or included in specific legacies and bequests, when the sale of such legacies and bequests is not necessary to pay debts), upon giving three weeks' notice of the time and place of such sale, by at least four advertisements, set up in the most public places in the county where the sale is to be made, or by inserting an advertisement in some newspaper published in the county where the sale is to be made, at least four weeks, successively, previous thereto. The sale may be upon a credit of not less than six nor more than twelve months' time, by taking note with good security of the purchasers at such sale. The sale may be for all cash, or part cash and part on time: *Provided*,

that any part or all of such personal property may, where so directed by the court, be sold at private sale."

It will be observed that the portion of the section of the statute which authorizes a public sale of the personal property of a decedent upon a credit, in express terms requires the administrator to take security for the property so sold. If, therefore, an administrator, in defiance of this provision of the statute, should proceed to sell the personal property belonging to the estate upon a credit, and take no security from the purchaser, it is obvious that he would be liable for any loss which might accrue to the estate on account of a neglect on his part to follow the plain provision of the statute.

But it is argued, that notwithstanding public sales are governed by the special provisions of the statute, yet private sales are on a different footing; that they were intended by the statute to be placed under the control and direction of the court; that in respect to such sales the administrator derives all his authority from the order which the court might see fit to make in each particular case. We do not think the statute will bear the construction contended for. The statute requires an administrator to sell the personal property belonging to the estate at public sale in all cases, unless otherwise ordered by the court,—in other words, the statute confers power on the Probate Court, for good cause shown, to order a portion or all of the personal property sold at private sale. But the statute does not confer power on the Probate Court to direct in the order that the property may be sold on credit without security. The power conferred on the Probate Court is merely to order or decree a private sale in the place of a public sale,—in all other respects the law regulating a public sale of property by an administrator remains in full force and effect, applicable to all sales, private as well as public. No reason whatever exists why an administrator should be required to take security for property sold at a public sale, and sell at private sale without security. The Probate Court has no more supervision over a private sale than it has over a public sale, and hence the same responsibility rests on the administrator to get good security in the one case as it does in the other. The words, "*provided*,

that any part or all of such personal property may, where so directed by the court, be sold at private sale," were added to the section as an amendment, by the legislature, in 1874, and as the amendment contains no expression which would lead to the conclusion that a private sale upon credit was authorized without security, we think it plain that the legislature intended that these sales, when ordered, should be made with security, precisely as public sales are made. The same reason that requires security in the one case demands it in the other. The order of the Probate Court prescribed no condition whatever in regard to the sale, nor did it impose any restrictions. The order merely authorized a private sale, leaving the administrator to be governed by the statute in making the sale. Had the administrator followed the statute, and in making the sale required good security, he could have been chargeable with no loss; but as he has neglected a plain requirement of the statute, and the estate has sustained a serious loss through his negligence, it is but right that the loss should fall upon the one who has been to blame.

The judgment will be affirmed.

Judgment affirmed.

LENTZ vs. PILERT.

[60 Maryland, 296.]

PERSON PAYING FUNERAL EXPENSES A CREDITOR ENTITLED TO
ADMINISTRATION.

A niece by marriage of an intestate decedent, who pays the latter's funeral expenses, and is thereby the largest creditor of the estate, is entitled to letters of administration as a creditor.

APPEAL from Baltimore county Orphans' Court.

W. Burns Trundle, for appellant.

Wm. Grason and *Richard Grason*, for appellee.

IRVING, J. It appears from this record that on the 16th day of February, 1883, a certain Margaret Heinlein died intestate in Baltimore county. Four days thereafter, viz., on the 20th day of February, the appellee filed in the Orphans' Court of Baltimore county an application for letters of administration. That application is in the following language: "Whereas, on the 16th day of February, 1883, a certain Margaret Heinlein died without leaving a will, and to the best of my knowledge and information, no relatives in this country; I therefore make application to your honorable court the grant of letters of administration to me." This petition, it will be observed, does not aver that the intestate left any personal estate to be administered, and does not state that the intestate died in Baltimore county. Before the Orphans' Court had acted on that petition, the appellant filed her petition in the same court stating the death of the intestate in Baltimore county, on the 16th of February, 1883, and that she left personal property amounting to three thousand dollars, in said county, and also valuable real estate. It further stated that Margaret Heinlein left "no child or descendant, nor father nor mother, nor other next of kin, either of the whole or half blood, nor any relations within this State;" but that the petitioner was a niece of George Heinlein, the intestate's husband, who had died several years before his wife, and that as such niece she was entitled, by the law of this State, to the one-fourth interest in the real estate. The appellant's petition further alleged, that on request Joseph B. Cook, an undertaker, had furnished "the burial case, carriages, hearse, and other requisites for the proper and decent interment of the remains of the said deceased, and that said funeral expenses amounting to \$88 56, are a preferred claim against the estate of said deceased; that said bill has been duly proved by said Cook, and your petitioner has paid the said Cook the full amount thereof, and has taken from him an assignment of the same." The bill and assignment are filed with the petition. By virtue of these alleged facts the petitioner claims that she is the largest creditor of the estate of the deceased and entitled by law to the administration of the estate, and prayed

for letters to be granted to her. Upon this petition, on the day of its presentation, the Orphans' Court passed an order refusing its application and granting letters of administration to the appellee. On the same day the appellant filed a petition praying leave to introduce testimony in support of her petition, which prayer was also rejected and appeal was taken from each order of the Orphans' Court in the premises.

The petition of the appellant praying for letters and stating the facts of the case was verified by the petitioner's oath. The petition of the appellee was not. Inasmuch as the court refused to hear testimony and have the same written down that the petitioner might use the same on appeal, we must and will assume that the Orphans' Court considered the facts established by the oath of the appellant attached to her petition, and that further testimony was unnecessary. The court regarded the facts alleged as insufficient to give the appellant any legal right to claim administration, and regarding both appellants as entire strangers, committed letters to the appellee; and if the appellant has no superior right by reason of her having defrayed the expenses of burial, the Orphans' Court exercised but a rightful discretion which is not reviewable. The appellant claims that, being the niece of the intestate's husband, she was her niece by affinity, and that whilst she was not bound to furnish burial for the deceased at her own cost, in the absence of all others, the duty did devolve upon her to order the requisites for proper burial, and that having done so, and having paid the bill, she is a creditor of the estate, and the "*largest creditor*," and therefore, by the code, entitled to have letters upon the estate to the exclusion of the appellee, who has no interest in, or claim on, the estate. Section 30 of article 93 of the code provides, "if there be no relations, administration shall be granted to the 'largest creditor' applying for the same." The appellant relies on this section of the code as establishing her right to letters of administration; and her solicitor contends that whether the word "creditor" used in this section be understood to mean one who became such in the lifetime of the deceased, or whose claim arose against the estate after the testator's or intestate's death, it makes no dif-

ference; that in either case the appellant is a creditor in the sense of the statute. Because the law holds the estate, in the hands of the executor or administrator, bound to such person, who, from the necessity of the case, has provided for deceased's burial, for the expense incurred, he argues that the law implies a promise from the deceased while living to pay for such necessities provided him after death. Baron Alderson gives countenance to such doctrine in *Chapple v. Cooper*, 13 Mees. & Wels. 253; and in a note to *Hare & Wallace's Comments on Rogers v. Price, Ex'r*, 3 Y. & J. 28, the same theory of implied contract on the part of the decedent is deduced and suggested. The exigencies of this case do not require us either to accept or pronounce against that theory. It is not the ordinary way in which such allowances from the estate of a deceased person have been justified. Numerous cases exist where the person who has provided the funeral has been allowed to recover from the executor or administrator to the extent of a reasonable outlay, in view of the rank and estate of the deceased, notwithstanding the executor may have given no orders. In such case because proper burial was indispensable, and somebody must take the responsibility of having it attended to, the law has generally been understood to accord payment from the estate on an implied promise on the part of the executor or administrator to pay it. (Chitty on Contracts, 286; *Green v. Salmon*, 8 A. & E. 348; *Tugwell v. Heyman*, 3 Campbell, 298; *Rogers v. Price*, 3 Y. & J. 28.)

The facts of the cases cited illustrate the propriety of this appellant, being next of kin by affinity, in the absence of persons standing in closer attitude, assuming to provide for the proper interment of the deceased. It was necessary, as Lord Ellenborough said in *Tugwell v. Heyman*, that somebody should see to it, and as this appellant was niece by marriage to the deceased, it was eminently proper, if not her absolute duty, that she should have given the orders. Having done so, and having paid the expenses incurred, she is certainly, according to the authorities cited, entitled to reimbursement from the estate. She is therefore a creditor of the estate; and if she be the "largest creditor" so as to meet that requirement of the

statute, we see no good reason why she shall not be entitled, as a matter of right, to the administration.

By the statute of the State funeral expenses, to a reasonable extent, are made a preferred charge upon the estate, because of the indispensable necessity for proper burial. Inasmuch, therefore, as the person who incurs that expense is a creditor of the estate, we cannot perceive why *such* creditor was rejected as not being within the meaning of the law, which accords administration as a matter of right to the "largest creditor," in the absence of kindred who are regarded as having prior right. The only reason why a *creditor* should, in such case, be entitled to administer, is because he has an interest in the estate's being administered, and being administered properly and promptly. The larger the demand against the estate the greater the interest; and therefore, without regard to respective fitness for the duty, the law of our State gives the "largest creditor" the prior right. A creditor who becomes such after the death of the decedent, and whose claim is entitled to priority of payment, even over the claims of those whose claims accrued in the decedent's lifetime, has equal interest with any other creditors in the proper and prompt settlement of the estate. Being a creditor who is *preferred in payment*, he certainly ought not to be denied, when he is the largest creditor also, the same right and privilege in respect to administration which is accorded creditors of inferior degree as to payment. He is clearly within the reason of the rule. He is not excluded by the letter of the law, for there is no qualifying word prefixed or added to the word "creditor" except "largest," which only indicates the order of preference. In this case it does not appear that there is any larger creditor applying; and we are told that in fact she is the only creditor. We do not find that the question has ever arisen directly in this State before; but we are not without precedent and authority for such construction in England, whence our statutory provision is borrowed. By the common law it was the practice for the ordinary to grant letters to the nearest friend. (Bracton, 60.) This was afterwards regulated by statute in the time of Edward III; and subsequently by 21 Henry

VIII, chapter 5. By the last statute it was directed that if the executor refused, or the person died intestate, administration should be committed "to the widow of the same person, or to his next of kin." Thereafter it seems to have been fully established and practiced in England, that letters should be granted in a particular order of priority among kindred very similar to our own statutory provisions. In Viner's Abridgment, vol. XI (2d ed.), p. 86, we find the English law on the subject thus stated: "1st. To the husband of the wife's (separate) goods and chattels. 2dly. To the wife of the husband's goods and chattels; but an administration may be granted to the father before the widow, and a residuary legatee ought to be preferred before the widow in an administration *cum testamento annexo*; if there is no husband or wife living, then, 3dly, to the children, sons or daughters. 4thly. If the children die first, to the father or mother; then 5thly, to a brother or sister of the whole blood. 6thly. To a brother or sister of the half blood, for they are all next of kin in equal degree; and if none of the half blood, then, 7thly, to the next of kin, uncle, aunt or cousin; and if none of these desire the administration, then, 8thly, to a *creditor*; for want of *all these*, 9thly, to any other person, or persons at the *discretion* of the ordinary." The right of a *creditor* to administration in the absence of the next of kin, in England, is fully recognized in all the books on the subject. (1 Comyn's Dig. Adm'r, B. 6; 4 Bac. Ab. G. p. 68.) The English courts have construed the term "creditor" in such connection to embrace persons having claims for funeral charges, and such who in any way became actually creditors of the estate after the death of the person whose estate is charged. In *Williams v. Jukes*, 34 L. J. (Probate), 50, the plaintiff had become security for the deceased in his lifetime. *After his death* he paid the money. It was held that, though the plaintiff did not pay the money in the lifetime of the testator so as to become his creditor before his death, the payment afterwards made him such creditor of the estate as *entitled him* to grant of letters.

In *Newcombe v. Beloe et al*, 45 L. J. (P. & M.) 37, it appears that the deceased left a will appointing executors. The

deceased also left a daughter, who employed a linen draper, Newcombe, to take charge of and provide for the funeral. He did so, on her assurance he should be paid from the estate. The daughter, in default of the executors to take letters, would have been entitled. She became insane, and Newcombe caused the executors to be cited to take letters, or show cause why letters should not be committed to him. The executors having been served and not appearing, the court granted letters to Newcombe. The judge, Sir J. P. Wilde, said: "I see no reason under the circumstances of the present case, why Mr. Newcombe should not be considered a *creditor*, and I therefore make a grant of administration to him *in that character*." The judge, in his opinion, refers to the case of *Fowler*, wherein the *undertaker* was regarded as a creditor, and letters were granted him. (*Fowler's Case*, 16 Jur. 894.)

The same view of the law was taken by Dr. Lushington *In the Goods of C. Spitty*, 16 Jur. 92. There the wife had a separate estate. The person who had paid the funeral expenses of the wife, took proceedings against the husband, and caused him to be cited to show cause why he should not administer. The husband appeared and contended that he could only be sued personally; but the court adjudged that the plaintiff was a creditor of the wife's estate, entitled to be heard in that capacity. In that case it is proper to note that it was done notwithstanding the plaintiff had for several years been endeavoring to get the husband to pay the bill.

Manifestly the same reason underlies the rule, existing in England and established by our statute, which accords administration to some creditor when kindred fail or neglect. There is no language in the law of either place restricting its application to the persons becoming creditors in the lifetime of the decedent. Each class has the same kind of interest, and there seems to be both wisdom and equity in the English construction of the word *creditor* in that connection, and no good reason appears to exist why we should not adopt the same view. The appellee's counsel in his brief, assumes that the appellant occupies the position of a bare purchaser of the undertaker's bill, and as having intruded herself thus into the

position of holding a claim against the estate. Whatever might be the legal status of a stranger holding such a position, his equity might be regarded as diminished by his seeking administration rights in that way ; but this appellant seems to have assumed the natural and praiseworthy responsibility of providing the requisites for so sad an occasion. She may have made herself personally liable. She has paid the bills and taken an assignment and occupies the relation of creditor. If she had not taken an assignment, but had been sued and judgment had been recovered, according to Lord Deaman, in *Green v. Salmon* (already cited), which was a case of that kind, she would have been a creditor of the estate and entitled to reimbursement so far as the judgment recovered was for expenses suitable to the condition and estate of the deceased. Whether the expense incurred in this instance was in keeping with the estate and situation of the deceased is a matter still with the Orphans' Court. We have no concern with that in this case. From what we have said it is apparent that the order of the Orphans' Court appealed from must be reversed. For aught that appears to us this appellant is the largest creditor. She only has applied as such creditor, and we think she is entitled to have letters.

Order reversed, and cause remanded.

ESTATE OF SUNDERLAND.

[60 Iowa, 732.]

RIGHT OF ADOPTED CHILD TO INHERIT THROUGH ADOPTED PARENT.

An act of another State authorizing the adoption of a child and providing she shall inherit from the adopted parents as "if she were their legitimate child," does not authorize her to claim by representation through her adopted father, a share in the estate of his father who survived him and died intestate in this State.

PROCEEDINGS to determine who are the heirs of John Sunderland, and who are entitled to inherit his estate.

Newman & Blake, for appellant.

Hall & Huston, for appellee.

SEEVERS, CH. J. This cause was submitted to the Circuit Court and to this court upon an agreed statement of facts. The material portion thereof is as follows: In 1860, Wm. P. Sunderland and his wife, and their niece Ella Louise Foote, were residents of the State of Louisiana, and in that year the General Assembly of that State passed an act authorizing the said Wm. P. and his wife to adopt the said Ella, and providing that her name should be changed, and that she should be known as Ella Louise Foote Sunderland. The following is the act passed by the General Assembly of said State.

"An act to authorize William P. Sunderland, and his wife Maria Louise Sunderland, to adopt their niece, Ella Louise Foote, and to change her name to Ella Louise Foote Sunderland.

"SECTION 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened: That William P. Sunderland and Maria Louise Sunderland, his wife, be and they are hereby authorized to adopt Ella Louise Foote, their niece, and that, after said adoption, the said Ella Louise Foote shall be known by the name of Ella Louise Foote Sunderland, and shall inherit from the said William P. and Maria Louise Sunderland, or either of them, as if she were their legitimate child, without prejudice to forced heirs, if any there be.

"SEC. 2. Be it further enacted, etc., that should the said Ella Louise die without issue, either the said William P. or Maria Louise Sunderland surviving, all property which she may have inherited from the deceased shall revert to the surviving spouse.

"SEC. 3. Be it further enacted, etc., that should the said Ella Louise survive the said William P. and Maria Louise Sunderland, and die without issue, then all property which she

may have inherited from either or both of said parties shall pass to the heirs of the said William P. and Maria Louise Sunderland, as though this act had never been passed."

William P. Sunderland and his wife adopted the said Ella in strict accordance with the provisions of the foregoing act. All of said parties continued to reside in Louisiana until the death of William P. and his wife, which preceded the death of John Sunderland, who resided and died in the State of Iowa, where the property to be distributed is situated. William P. is the son of John Sunderland. The appellant claims that under the act of adoption and law of Louisiana, she became the child of, and heir of her adopting father. That the law of her domicile fixed her *status*, and, because of such, she became the child, and entitled to inherit from such parent, not only in Louisiana, but in this State, unless there is some statute or policy of the State of Iowa which prevents her from so inheriting. In support of this proposition, *Ross v. Ross*, 129 Mass. 243, is cited. The question in that case was whether a child adopted in Pennsylvania who, with the adopting parents, afterwards became domiciled in Massachusetts, where one of the parents died, could inherit from such parent property situate in the last-named State. It was held, under the circumstances, that he could inherit.

The precise question determined in that case is not in the case at bar. It is John Sunderland's estate which is to be distributed, and not that of W. P. Sunderland. As the latter died before John, the former did not inherit from the latter, and the property of John did not vest in or belong to William P. But the appellant claims, as has been before stated, that she is the child and heir of Wm. P., as fixed by the law of her domicile, and therefore she inherits a share of John Sunderland's estate under a statute of this State which is as follows: "If any one of his (intestate's) children be dead, the heirs of such child shall inherit his share in accordance with the rules herein prescribed, in the same manner as though such child had outlived his parents." (Code, § 2454.)

There are some doubts whether the word heirs as used in the foregoing statute means one that has been adopted. Pass-

ing such question, the appellant, to maintain her claim, must not only establish that she can inherit from William P. Sunderland, but also that she can inherit through him, or by the right of representation, such share of John Sunderland's estate as William P. would have inherited had he outlived the former. This question can only and must be determined by a construction of the statute of Louisiana, and for the purposes of the case it will be conceded that the *status* of the appellant is to be fixed and determined by the law of her domicile.

The statute aforesaid provides the appellant "shall be known by the name of Ella Louise Foote Sunderland and shall inherit from said William P. or Maria Louise Sunderland, or either of them, as if she were their legitimate child." A strained construction should not be placed on the foregoing statute. The appellant inherits *from* William P. Sunderland as though she were his legitimate child. That is, she inherits from him as a legitimate child would, or in the same manner or to the same extent. But she is not his child or heir except as fixed by the Louisiana statute. That statute does not say that the appellant is the heir or entitled to inherit from John Sunderland, or that she shall or can inherit, a part of his estate through William P. Whatever property the latter owned at his death the appellant can inherit, but it does not follow that she can inherit property that never belonged to her adopting parent. If the intention had been that the appellant should inherit through William P. Sunderland, we think the statute would have so provided. It is a special statute, evidently passed at the instance of William P. Its terms and conditions were, without doubt, dictated by him, and we are forced to the conclusion that the only purpose and intent was as expressed therein and as above indicated. That such was the intent is apparent from the second and third sections. Special provisions are there made as to who shall inherit in case the appellant survived her adopting parents and died without issue. In such case the heirs of such parents were to inherit, and not the heirs of the appellant. It is evident the statute of this State cannot enlarge or extend the scope and effect of the statute authorizing the adoption of the appellant.

The facts in *Keegan v. Geraghty*, 14 Chicago Legal News, 84 (s. c. 101 Ill. 26), were that Michael R. Keegan and his wife adopted Mary Ann Keegan as their daughter, under a statute of Wisconsin, which provided that an adopted child "shall be deemed, for the purpose of inheritance and succession * * * the same to all intents and purposes as if such child had been born in lawful wedlock * * * saving only that such child shall not be deemed capable of taking property expressly limited to the heirs of the body or bodies of such petitioner or petitioners."

Michael R. Keegan and his wife removed to Illinois, where the latter died, and the said Michael married again and left surviving him a natural child to whom he devised his property. The question was whether Mary Ann Keegan could inherit from such child. It was held by the Supreme Court of Illinois that she could not. The decision was based upon a construction of a statute of that State which provided: "A child so adopted shall be deemed, for the purposes of inheritance by such child, * * * as if he had been born in lawful wedlock." It was held that Mary Ann Keegan could not inherit from the deceased child of Michael R. Keegan, because she was not the sister of the said child. And yet she was such, if for the purpose of inheritance she should be regarded as having been born in lawful wedlock. But as she was not a sister in fact, it was held that she could not inherit under the statute. The logical result of the decision is, that the adopted child under the Illinois statute can only inherit from the adopting parent.

The appellant is not the child in fact of John Sunderland, nor his heir, because the act of adoption does not make her such, or provide that she shall inherit through William P. Sunderland, or by the right of representation.

Affirmed.

ADAMS, J., *dissenting*. The question presented in this case is as to the distribution of that part of John Sunderland's estate which would have been inherited by his son, Wm. P. Sunderland, if he had outlived the intestate. There ought, I

think, to be no difficulty in answering the question, because the statute provides who shall take his share in plain and explicit terms, and this is wholly a matter of statute. We have no occasion to inquire who would take, but for the statute. There is no natural right which the statute cannot control. The wishes of the ancestor must control, and the statute is supposed to express his wishes, in the absence of any testamentary disposition.

Where, then, a person dies intestate, we have only to inquire what was the statute under which he died. If we find its terms to be plain and unambiguous, we must take it as it reads. We cannot be allowed to engraft upon it an exception by judicial construction. Yet that is what the majority does, as it seems to me, and the only reason for it, that I can discover, is that the statute innovates upon the common law rule of descent, and cannot be supposed to express the wishes of the intestate, notwithstanding it must be assumed that he elected to die intestate.

Let us see whether I am correct in my position, that the majority engrafts by judicial construction an exception upon a plain and unambiguous statute. Section 2454 of the Code is in these words: "If any one of his (the intestate's) children be dead, the heirs of such child shall inherit his share in accordance with the rules hereinafter prescribed, in the same manner as though such child had outlived his parents." We have a case where one of the intestate's children was dead at the time the intestate died. Wm. P. Sunderland was one of the intestate's children, and he was dead. Now the statute expressly says that "the heirs of such child shall inherit his share." To determine, then, who shall inherit his share, we have only to inquire who were his heirs. If Ella Louise Foote Sunderland was his heir, she must inherit. That she was not such there can be no pretense. She was adopted with that express view. The act of adoption expressly provides "that Wm. P. Sunderland and Maria Louise Sunderland, his wife, be, and they are hereby, authorized to adopt Ella Louise Foote, their niece, and that after said adoption the said Ella Louise Foote shall be known by the name of Ella Louise Foote Sun-

derland, and shall inherit from the said Wm. P. and Maria Louise Sunderland, or either of them, as if she were their legitimate child." Without any question, then, Ella Louise Foote Sunderland became the heir of Wm. P. Sunderland. We come next to inquire whether she was such heir as is contemplated by the word "heirs" as used in section 2454 of the Code, above cited. The word *heir* is a legal term, and means any one who can inherit. This is all the significance that the word has. It seems abundantly evident to me that by the word "heirs," as used in the section cited, is meant those who can inherit. It does not, I think, mean heirs by blood alone, nor heirs by adoption alone, but all who can inherit. We have already held that our statute of descent must be construed literally, regardless of blood relationship. (*Moore v. Weaver*, 53 Iowa, 11.) To my mind it is clear that those who would have inherited from Wm. P. Sunderland, if he survived his father, shall now inherit his share. We can easily conceive that Wm. P. Sunderland and his wife may have adopted their niece largely with the view of perspective inheritance from the intestate. There is certainly no reason for supposing that the construction which I would give the statute would work an unforeseen and undesired diversion of the property. It is true, the act of adoption modifies what would otherwise be the rule of inheritance from Ella Louise. But the special provision as to inheritance from her does not modify, nor have any tendency to modify, the express provision as to inheritance by her. She is not the less the heir of Wm. P. as provided, and is not the less embraced within the word "heirs" as used in the section of the Code above cited. Nor does the fact that she was adopted in Louisiana make her less the heir. Her adoption there established her relation to her adopting father completely, and that relation must be recognized elsewhere. (*Ross v. Ross*, 129 Mass. 243.) She without question would have inherited from Wm. P. Sunderland in Iowa. That is all we need to know, because the statute expressly makes Wm. P.'s heir, John's heir Wm. P. being dead. It distributes what would have been Wm. P.'s share to those who would have inherited from Wm. P. if he had survived his

father and died intestate seized of it. No language could more clearly give expression to this idea.

But it is thought by the majority that the construction which should be given to our statute of descent should be governed somewhat by the construction which has been given by the Supreme Court of Illinois to the Illinois statute of descent. The majority cited and rely upon *Keegan v. Gerahty*, 14 Chicago Legal News, 84 (s. c. 101 Ill. 26). But in my opinion, that case bears no analogy to this. The question in that case was as to the descent of the estate of one Mary Gertrude Keegan. The plaintiff, Mary Ann Keegan, claimed to inherit it as the heir of Mary Gertrude. Her alleged heirship was predicated upon the theory that she was the sister of Mary Gertrude. Had she been the sister, she would under the statute of Illinois have been the heir. The question presented was as to whether she was the sister. The court held that she was not. The fact was that she was the adopted daughter of Michael R. Keegan, and the intestate Mary Gertrude Keegan was the actual daughter of Michael R. Keegan. The court very properly held that Mary Ann Keegan and Mary Gertrude were not sisters. The relation of sister, unlike that of heir, is a mere natural relation, and cannot be constituted by statutes, as the relation of heir can be. The court in that case, referring to the statute, said: "To inherit under that statute she (the plaintiff) must be a sister of Mary Gertrude Keegan. Petitioner is not such sister, nor has she been made an adopted sister, and had given her the right of an adopted sister to Mary Gertrude Keegan. An adopted child is not a child in fact, nor is an adopted child, having the rights of a child, a child in fact. But, under the statute of descent, to inherit from Mary Gertrude Keegan as her sister, the petitioner must have been the actual child of Michael R. Keegan."

The court further held in that case that the petitioner, who had been adopted under the laws of Wisconsin, could not have greater rights than if adopted under the laws of Illinois, and by the laws of Illinois it is expressly provided that an adopted child shall not be capable of taking "property from the lineal or collateral kindred of the parent by right of representation."

How inapplicable that case is to the case at bar may be seen from this, that if Ella Louise Foote Sunderland is the heir of Wm. P. Sunderland within the meaning of the Iowa statute, then by that same statute she is expressly made capable of taking property from the lineal kindred by right of representation. I cannot agree with the majority, and I think that the judgment of the court below should be reversed.

I am authorized to say that Mr. Justice Day concurs with me in this dissent.

HANDLEY vs. WRIGHTSON.

[60 Maryland, 198.]

PRECATORY WORDS IN A DEVISE.—MEANING OF EXPRESSION “NEAR RELATIVES.”

A devise by the testator to his wife, “with a special request that at her death she give the said lands to be equally divided between her near relatives and mine,” creates a trust for the benefit of such relatives.

The expression “near relatives” is legally certain, and means such persons as will take under the statute of distributions.

APPEAL from the Circuit Court of Dorchester county.
The opinion states the case.

Clement Sulivane, for appellants.

Daniel M. Henry, Jr., Wm. R. Martin, Chas. E. Hayward, and *Sewell T. Milbourne*, for appellees.

RITCHIE, J. The appeal in this case is from the decree of the court below based upon its construction of a clause in the last will of William Wrightson, deceased, which is as follows:

“I give and devise to my son, William Clinton Wrightson, all my lands and the residue of my personal estate, after my wife’s thirds are taken out, and all my just debts are paid, and the expenses of settling my estate are taken out, with the fol-

lowing proviso—that is to say, if my son, William Clinton Wrightson should die leaving no child of the lawful issue of his body at the time of his death, it is my will and desire that my said wife, Sarah Wrightson, should have my said lands or real estate above devised to my said son, with a special request that at her death she give the said lands to be equally divided between her near relatives and mine.”

The said son of the testator having survived his father and having died unmarried and without issue, the widow of the testator, the said Sarah Wrightson, having outlived the said William Clinton Wrightson, who was the only son of herself and William Wrightson, took possession of her husband's said lands, according to the terms of said devise and remained in possession and enjoyment thereof until she died in the year 1881. The said Sarah having died intestate, without having by will, deed or otherwise given the said lands to be equally divided between her near relatives and the near relatives of her husband, the appellees, as the next of kin or heirs at law of the said testator, filed their bill of complaint charging that by the terms of the said devise to said Sarah Wrightson a trust was created under which they became entitled to an undivided one-half of said lands, and the defendants in the bill, as the next of kin or heirs at law of the said widow, became entitled to the other undivided one-half of said lands, and praying a sale, because incapable of advantageous partition, of the said lands, and for distribution of the proceeds thereof among the said parties.

The defendants in their answer, while admitting all the facts alleged in the bill, including the averments that the complainants are the heirs at law of the said testator, and the defendants the heirs at law of the said widow, and that the said lands are not susceptible of division, deny that any trust was created by said devise, but claim that under it, the said Sarah Wrightson, upon the death of the testator's said son without issue, took a fee simple title to her husband's real estate, subject exclusively to her own power of disposition; and having thus the sole ownership thereof, upon her dying intestate, the said real

estate vested in them as her next of kin or heirs at law, and the complainants had no title or interest whatever in the same.

The Circuit Court sitting in equity, sustained the construction of the will contended for by the complainants, and decreed a sale accordingly; whereupon the defendants prayed this appeal.

The case thus presented lies within a very narrow compass.

As the trust, if any, attached by the testator to his devise to his wife is not couched in the language of command or positive injunction, the first point of inquiry is whether, and to what extent, this court is disposed to regard the wishes of a testator when expressed in the form of desire or expectation as grafting a trust upon a devise or legacy; and, secondly, assuming that words of that character will be held to create a trust, is there anything in the terms or nature of the present devise that will defeat the effect such words would otherwise have?

It may be stated as a general result of the cases in regard to the effect of words expressive of wishes of a testator, not imperative in form, that whether the words of the will are those of recommendation or precatory, or expressing hope, or that the testator has no doubt, if the objects with regard to whom such terms are applied are certain, and the subjects of property to be given are also certain, the words are considered imperative and create a trust. (1 Jarman on Wills [Rand. & Talc. ed.], 680; 2 Story's Eq. Jur. § 1068.)

It is true a tendency has been manifested by some courts to restrict the application of this general rule, or to qualify it, and even, as in *Pennock's Case*, 20 Penn. St. Rep. 272, to reject it altogether, and to adopt as more reasonable the presumption, that, words precatory in form are meant to imply discretion in the donee, and should be so construed, unless clearly shown to be used in an imperative sense from other parts of the will; but we consider the weight of authority to be for upholding words of request, desire, expectation, and the like, as creative of trusts, when the contrary does not appear from the context or by necessary implication.

Among many comparatively late cases in which this doc-

trine has been maintained may be cited those of *Reed's Administrator v. Reed*, 30 Ind. 313; *Harrison v. Harrison's Adm'r*, 2 Grattan, 1; and *Warner v. Bates*, 98 Mass. 274. In the first of these cases the bequest was: "It is my will that my son Stephen shall receive of my estate the sum of two hundred dollars to be paid him at the death of my wife, provided my wife shall outlive me, which said two hundred dollars it is my wish my son Stephen shall add to the advancement he may make his son, Sampson S. Reed, when Sampson comes of age." The court held that the bequest created a trust in favor of Sampson and that the legacy was to go to him on his arriving at majority, whether his father made any advancement to him or not. The case in Grattan arose upon the construction of a devise very similar to the one in the present case. It was: "In the utmost confidence in my wife, I leave her all my worldly goods to sell or keep for distribution amongst our dear children as she may think proper. My whole estate, real and personal, are left in fee simple to her; only requesting her to make an equal distribution among our heirs. * * * Of course I wish first of all that all my debts shall be paid." It was there held, that the widow was invested with the legal title to the whole estate, subject to the payment of the testator's debts; that she took the beneficial interest in the estate for her life, and that the children of the marriage took a vested remainder in fee in the estate to commence in possession at the widow's death; or earlier at her election. This decision distinctly recognizes the principle, that precatory words in a will are sufficient to create a trust, where the subject and object are certain.

In *Warner v. Bates*, 98 Mass. 274, the wife in her will gave to her husband the use and income of the estate, "in the full confidence" that he would give her children by a former marriage such comfort and support as they might stand in need of. The court in that case held that these words subjected the income to a trust which could be enforced in equity.

Bigelow, C. J., in pronouncing the opinion, discusses the doctrine of precatory trusts with such clearness and ability, and the relations of the testator and the legatee being that

of husband and wife, as in this case, we make the following quotation from his opinion :

“ We see no sufficient ground for calling in question the wisdom or policy of the rule of construction uniformly applied to wills in the courts in England, and in most of the United States, that words of entreaty, recommendation or wish, addressed by a testator to a devisee or legatee, will make him a trustee for the person or persons in whose favor such expressions are used, provided the testator has pointed out with clearness and certainty the objects of the trust, and the subject-matter on which it is to attach, or from which it is to arise and be administered. The criticisms which have been sometimes applied to this rule by text writers, and in judicial opinions, will be found to rest mainly on its applications in particular cases, and not to involve a doubt of the correctness of the rule itself, as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it, if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the testator is to govern, and to apply it only where the creation of a trust will clearly subserve that intent. It may sometimes be difficult to gather that intent, and there is always a tendency to construe words as obligatory in furtherance of a result which accords with a plain moral duty on the part of a devisee or legatee, and with what it may be supposed the testator would do if he could control his action. But difficulties of this nature, which are inherent in the subject-matter, can always be readily overcome by bearing in mind and rigidly applying in all such cases the test, that to create a trust it must clearly appear that the testator intended to govern and control the conduct of the party to whom the language of the will is addressed, and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of a discretion which he intended to repose in the legatee or devisee. If the objects of the supposed trust are certain and definite ; if the property to which it is to attach is clearly pointed out ; if the relations and situation of the testator and the supposed *cestuis que trust* are such as to

indicate a strong interest on the part of the testator in making them partakers of his bounty; and above all, if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory on the donee; the first and reasonable interpretation is that a trust is created which is obligatory and can be enforced in equity as against the trustee by those in whose behalf the beneficial use of the gift was intended. * * * It is suggested that in other clauses of the will, in which she creates a trust in favor of her daughters for their respective shares of her estate, of which they are to have the entire income after the death of her husband, she does not use words of entreaty, request and recommendation, but apt and technical words by which to establish a trust in their behalf. But we think this suggestion is not entitled to much weight. She might well express herself in a different language when addressing her husband from that which she would use toward strangers, and at the same time intend a similar result. Words of confidence, entreaty and recommendation were natural and appropriate when used to express the will of a testatrix who intended to direct and control the conduct of her husband in a matter in which the right to give directions and to control belonged to her. In such a case, the words of Lord Loughborough are applicable: 'Where a person recommends to another who is independent of him, there is nothing imperative; but if he recommends that to be done by a person whom he has a right to order to do it, the mode is only civility.' "

In support of this opinion the chief justice cites a number of authorities, both English and American.

Nor is the doctrine of the creation of trusts by words of recommendation, desire, hope and the like, without distinct recognition in the decisions of this court. In the cases of *Tolson v. Tolson*, 11 G. & J. 159; *Negroes Chase et al. v. Plummer*, 17 Md. 165; and *Williams, Ex'r, et al. v. Worthington et al.* 49 Md. 572, whilst the court in the first of these cases does not explicitly dwell in its opinion on this rule of construction, and in the last two cases decides that under this particular circumstances no trusts were created, the decision in

Tolson v. Tolson, as that case was presented and argued, and the tenor and citations of the opinions in the cases of *Chase v. Plummer*, and *Williams, Ex'r, et al. v. Worthington et al.*, which were decided upon grounds not in conflict with the principles of the rule itself, clearly indicate the binding force in the judgment of this tribunal, of the doctrine of precatory trusts in all such cases to which it is properly applicable.

With this recognition of the doctrine of precatory trusts it remains for us to consider whether the words employed by the testator, looking to the whole will, create the trust contended for by the appellees.

The property to which the supposed trust attaches is clearly described. It is "all my lands," first devised to his son, but which his wife is to have in case his son dies without lawful issue, a contingency which happened. With the devise to his wife are coupled the words, "*with a special request* that at her death she give the said lands to be equally divided between her near relatives and mine." The wish expressed is clear and emphatic; the person addressed is his own wife; the time indicated for her disposition of the property is at her death, when she could no longer enjoy it herself; the mode of disposition is distinctly prescribed—the lands are to be equally divided between two classes of beneficiaries; these two classes are his wife's near relatives and his own—persons whom he would have a strong motive to make partakers of his bounty, the one class from natural affection for his own blood, the other from affection for his wife and regard for her interest in her own kindred. Thus the objects of his bounty are clearly pointed out, and their selection is in consonance with his relations to all concerned.

To disregard his "special request," would be to operate a discrimination against the testator's own kin, and to pass his estate upon the death of his wife, intestate, wholly to her heirs; a result repugnant to natural instincts, and in violence to his expressed desire.

In all respects the conditions here exist which justify the application of the rule of implied trusts from precatory words in the present case; and we think a trust was clearly created

in the testator's lands for the benefit of the near relatives of his wife and of himself.

The capacity of those to take under a devise or legacy who are described as "relations" has been too long upheld by settled construction for legal uncertainty to attach to the term "near relatives," used by the testator of the will before us. And in determining who, under this "*nomen collectivum*" are entitled, and in what proportions, recourse, as a general rule, is had to the Statute of Distributions. (2 Jarman on Wills [5th Am. ed.], 661; 2 Wms. on Ex. [5th Am. ed.] 1003, and notes; 2 Redfield on Wills [3d ed.], 85.)

In *Whitehorne v. Harris*, 2 Vesey, Sr. 527, the bequest was to all and every person and persons who are "near relations to me." In *Doe ex dem. Thwaites et al. v. Over et al.* 1 Taunton, 263, the testator gave his freehold estates to his wife, to be equally divided at her decease amongst the "relations on his side." In the first case the legatees, in the second the devisees, took under the Statutes of Distributions. (See, also, *Harding v. Glyn*, 1 Atk. 469, and notes; *Cruwys v. Colman*, 9 Vesey, 319; *Tiffin v. Longman*, 15 Beav. 275.)

From this expression of our views, it follows that we sustain the decree passed below, which was fortified by an able discussion of the principles involved in the construction of the will, in the court's opinion, and will affirm the decree accordingly.

Decree affirmed, and cause remanded.

Meaning of word "relations."—**Precatory words.**—1. *Relations.*—The word "relations," taken in its widest extent, embraces persons of every degree of consanguinity, and hence, unless some line were drawn, every gift to relations, *eo nomine*, would be void for uncertainty. *Huling v. Fenner*, 9 R. L. 410; *Cleaver v. Cleaver*, 39 Wisconsin, 96.

The courts with great uniformity, both in England and America, have construed the word "relations" to include those persons only who would take under the statutes of distributions. *Green v. Howard*, 1 Bro. Ch. 31; *Phillips v. Garth*, 3 Id. 64; *Anon.* 1 P. Wms. 327; *Roach v. Hammond*, Prec. in Ch. 401; *Wright v. Atkyns*, 1 Turn. & R. 143; *Brunsdon v. Woolredge*, Amb. 507; *Widmore v. Woodroffe*, Id. 686; *Edge v. Salisbury*, Id. 70.

Wherein Lord Hardwicke says: "I will not construe the intention to extend further than to nearest relations, such as would take under the statute of distribution, otherwise it would be endless to find out everybody that were relations."

The American rule is the same. *Toff v. Hosmer*, 14 Mich. 249; *Varell v. Wendell*, 20 N. H. 431; *Ennis v. Pentz*, 3 Bradf. 332; *Drew v. Wakefield*, 54 Maine, 291; *McNeilledge v. Galbraith*, 8 Serg. & R. 43. See, also, 11 Id. 103.

The rule is not varied by the modification of the word "near." "Near relations" is held to mean the same thing as "relations." *Whitehorne v. Harris*, 2 Ves. 527. See, also, 19 Id. 403.

When the gift is to "nearest relations" the next of kin will take to the exclusion of those who under the statute would be entitled to take by representation. *Pyot v. Pyot*, 1 Ves. 335; *Marsh v. Marsh*, 1 Bro. C. C. 293; *Smith v. Campbell*, 19 Ves. 400; *Stamp v. Cooke*, 1 Cox, 234.

"Relations" does not include relations by affinity. *Maitland v. Adair*, 3 Ves. 231; *Esty v. Clark*, 101 Mass. 36; *Storer v. Wheatland*, 1 Penn. St. 506; *Hibbert v. Hibbert*, L. R. 15 Eq. 372.

A gift to "relations" does not include a wife. *Worseley v. Johnson*, 3 Atkyns, 758 (3); *Esty v. Clark*, cited above.

Nor does it include a step-son. *Kimball v. Story*, 108 Mass. 332.

Nor an illegitimate niece, though she had been called a niece in another part of the will. *Hibbert v. Hibbert*, cited above.

"Poor relations" has been held to mean such of the relations as are poor and objects of charity, construing the word *relations* according to the usual rule, as above. *Brunsdon v. Woolredge*, Amb. 507; *Isaac v. Defriez*, Id. 595.

The word "poor" will not be wholly disregarded unless it appears to have been used as a term of endearment, nor will it operate to admit relations beyond the limit of the statute. *Doyley v. Attorney General*, 4 Vin. Abr. 485, pl. 16; *Coor v. Bedford*, 2 Ch. Rep. 146; *Griffith v. Jones*, 2 Id. 394; *Goodinge v. Goodinge*, 1 Ves. 231; *Gillam v. Taylor*, L. R. 16 Eq. 581; *Attorney General v. Duke of Northumberland*, 7 Ch. D. 745; *Mahon v. Savage*, 1 Sch. & Lef. 111.

If the testator has manifested an intention to extend the meaning of "relations" further than the statute of distributions, the court will so decree. *Bennett v. Honeywood*, Amb. 708.

2. *Precatory words*.—It is settled law that words of recommendation, request, advice or entreaty, addressed to one to whom something is given by will, will make the donee a trustee for the person or persons in whose favor such expressions are used, provided that both the subject and the object of the trust are made sufficiently clear. *Knight v. Knight*, 3 Beas. 148; 11 Cl. & Fin. 518 (this is a very full and learned discussion by Lord

Langdale); *Foose v. Whitmore*, 82 N. Y. 405; s. c. 1 Am. Prob. R. 577 (this is a late and leading case). See, also, 2 W. & Tudor's L. C. Eq. 860 and 1857; *Harding v. Glyn*, 1 Atk. 469; *Willis v. Kymer*, 7 Ch. D. 181.

Mere precatory words are hardly sufficient to create a trust. It must appear affirmatively that they were intended to be imperative. *Burt v. Herron*, 66 Penn. St. 400 (by Sharswood, J.). "No commendatory terms are sufficient to create a trust unless there be certainty as to the parties to take, and what they are to take." *Lines v. Darden*, 5 Florida, 51.

To the same effect, see *Gilbert v. Chapin*, 19 Conn. 842.

The older cases carry the doctrine very far. In some instances very slight expressions have been held sufficient to raise a trust, *e. g.*:

"In full confidence." *Le Marchant v. Le Marchant*, L. R. 18 Eq. 414.

"Confides," "trusts and confides." *Palmer v. Simmonds*, 2 Drew. 221; *Macnab v. Whitbread*, 17 Beav. 299.

"Entreats." *Prevost v. Clarke*, 2 Madd. 458.

"In the full confidence that." *Warner v. Bates*, 98 Mass. 274; *Bull v. Bull*, 8 Conn. 47; *Coate's Appeal*, 2 Penn. St. 129.

"In the belief that." *Van Amee v. Jackson*, 35 Vermont, 176.

Even the word "allow." *Houter v. Stenbridge*, 12 Ga. 192.

The following words have been held insufficient to raise a trust:

"Desire and hope." *Hess v. Singler*, 114 Mass. 56.

"Wish and desire." *Negroes Chase v. Plummer*, 17 Maryland, 165. See, also, *Rhett v. Mason*, 18 Gratt. 541.

"My wish." *Parnall v. Parnall*, L. R. 9 Ch. D. 96.

The modern tendency is very decidedly to restrict the doctrine. The judges show a decided leaning against the whole doctrine of precatory trusts. *Williams v. Worthington*, 49 Maryland, 572; *Cockrill v. Armstrong*, 31 Arkansas, 580; *Collins v. Carlisle*, 7 B. Mon. 13; *Hunt v. Hunt*, 11 Nevada, 442; *Biddle's Appeal*, 80 Penn. St. 258; *Second Church v. Dishrow*, 52 Id. 219; *Dresser v. Dresser*, 46 Maine, 48; *Warner v. Bates*, cited above; *Foose v. Whitmore*, cited above.

"The first case that construed words of recommendation into a command made a will for the testator, for every one knows the distinction between them." *Sale v. Moore*, 1 Sim. 540.

Lord Eldon says: "This sort of trust is generally a surprise upon the intention, but it is too late to correct that." *Wright v. Atkyns*, 1 V. & B. 315; s. c. Turn. & R. 159.

See, also, as to the restrictions and objections to the doctrine, *Meredith v. Heneage*, 1 Sim. 542; *Briggs v. Penny*, 3 Macn. & G. 546, 554; *Tolson v. Tolson*, 10 Gill & J. 159; *Ingram v. Fraley*, 29 Ga. 553; *Hoover v. Lovejoy*, 108 Mass. 529; *Rhett v. Mason's Executors*, 18 Gratt. 541; *Young v. Young*, 68 N. C. 809.

GAY vs. GAY.

[60 Iowa, 415.]

REVOCATION.—WHAT CONSTITUTES “DESTRUCTION” OF WILL—
DECLARATIONS OF TESTATOR TO SHOW INTENTION TO REVOKE.

The drawing of scrolls through the signature to a will in such manner as not to obliterate it or render it illegible, is not a “destruction” of the will, within the statute regulating revocations.

Where the act relied on is sufficient to work a revocation if done with intent to revoke, declarations of the testator are admissible to prove such an intention.

PROCEEDINGS at law to set aside the probate of the will of Harvey D. Gay.

Bois & Couch and *Nichols & Burnham*, for appellant.

Hubbard, Clarke & Dawley, for appellee.

DAY, J. Harvey D. Gay died in July, 1878. Some time after his death, his widow, Virginia Gay, discovered a package of papers in the secretary in the back parlor. Soon thereafter she gave the papers to Mr. Hawkins, the administrator of the estate. About the last of August, 1880, the administrator in looking over these papers, which consisted chiefly of canceled mortgages, found the paper in question, purporting to be the last will of Harvey D. Gay. When found, two scrolls were drawn with a pen lengthwise along the signature, but not in such manner as to obliterate it or render it illegible. The will was then filed in the office of the clerk of the Circuit Court for the purpose of probating it. Some time thereafter the deputy clerk, in unfolding the will, tore the right hand margin to the depth of one-eighth or one-fourth of an inch. This tear communicated with and opened a cut just over the signature, about two or three inches in length. When this cut was made does not satisfactorily appear, but the evidence shows that it was not made entirely through the paper, and that it was not visible until it was opened by the deputy clerk.

The determination of the question involved will be greatly facilitated by considering the state of the law upon the

subject prior to the adoption of the statute under which the question arises. By the 6th section of the statute of frauds, 29 Car. II, c. 3, it is provided that the revocation of a will by injury to the instrument itself can be effected only by "burning, canceling, tearing or obliterating the same by the testator himself, or in his presence, and by his direction and consent." Under this statute it was held that to constitute a revocation of a will by burning, there must, at least, be a burning of a part of the paper on which the will is (*Doe & Reed v. Harris*, 8 Ad. & E. 1), and that a very slight act of tearing and burning is sufficient to effect a revocation, if done with such intention (*Bibb & Mole v. Thomas*, 2 W. Bl. 1043); that when a pencil instead of a pen is used for cancellation, the revocation is not necessarily ineffectual, and it may be shown that it was intended to be final (*Mence v. Mence*, 18 Ves. 348; *Frances v. Grover*, 5 Hare, 39), and that, in order to constitute a revocation by obliteration, it is not essential that every word shall be obliterated, the revocation being complete, if enough of the material part be expunged to show an intention that the devise shall not stand, as where the testator draws his pen across the devisee's name. (*Mence v. Mence*, 18 Ves. 350; 1 Jarman on Wills, 129-135.) The act, 1 Vict. c. 26, provides that the revocation of a will by injury to the instrument itself, shall be only "by burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same." This statute, it is to be observed, omits the words *canceling or obliterating*, found in the statute of frauds, and substitutes therefor the words *otherwise destroying*. Under this statute it has been held that the words "otherwise destroying" are to be taken to mean a destruction *ejusdem generis* with the modes before mentioned, that is, destruction, in the proper sense of the word, of the substance or contents of the will, or, at least, complete effacement of the writing, as by pasting over it a blank paper (*Re Horsford*, L. R. 3 P. & D. 211); and not a destroying in a secondary sense, as by canceling or incomplete obliteration (*Stephens v. Taprell*, 2 Curt. 458; *Hobbs v. Knight*, 1 Curt. 779); that cancellation and obliteration, unless

they prevent the words, as originally written, from being apparent by looking at the will itself, are plainly excluded by the statute (*Re Dyer*, 5 Jur. 1016; *Re Fary*, 15 Jur. 1114), and that glasses may be used for discovering what the words obliterated originally were. (1 Jarman on Wills, 142, and cases cited.) Chapter 162 of the Revised Statutes of the Territory of Iowa, section 9, respecting the revocation of a will by injury to the instrument itself, provides that "no will, nor any part thereof, shall be revoked unless by burning, tearing, canceling or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence, and by his direction." This, it will be observed, is identical with the statute. (29 Car. II, c. 3.) In the Code of 1851, the provisions of our present statute were adopted, as follows: "Section 1288. Wills can be revoked, in whole or in part, only by being canceled or destroyed by the act or direction of the testator, with the intention of so revoking them, or by the execution of subsequent wills. Section 1289. When done by cancellation, the revocation must be witnessed in the same manner as the making of a new will." (Revision, §§ 2320, 2321; Code of 1878, §§ 2329 and 2330.)

When a statute provides the manner in which a will may be revoked, that manner must be pursued. (*Wright v. Wright*, 5 Ind. 391; *Runkle v. Gates*, 11 Ind. 95; *Blanchard v. Blanchard*, 32 Vt. 62; *Gains v. Gains*, 2 A. K. Marshall, 190; *Clingan v. Mitcheltree*, 2 Penn. St. 25; *Doe d. Reed v. Harris*, 6 Ad. & Ellis, 209.) Our statute provides that a will may be revoked, in whole or in part: *First*. By being destroyed. *Second*. By being canceled, the cancellation being witnessed in the same manner as the making of a new will. If the scroll drawn over the name of the testator had entirely obliterated the signature, this might have worked a destruction of the will, upon the ground that it had destroyed that without which the will could not exist. (See *Hobbs v. Knight*, 1 Curt. Ecc. Rep. 768; *Price v. Powell*, 3 H. & N. 341; *The Goods of Harris*, 3 Sw. & Tr. 485; *Goods of Gullan*, 1 Sw. & Tr. 23; *Goods of Coleman*, 2 Sw. & Tr. 314.) In this case, however, the scrolls drawn across the signature of the testator

do not obliterate it, nor render it illegible. They do not, therefore, constitute a destruction of the will. (See *Re Dyer*, 5 Jur. 1016; *Re Fary*, 15 Jur. 1114; *Re Brewster*, 6 Jur. [N. S.] 56; *Lushington v. Onslow*, 12 Jur. 465; *Stephens v. Laprell*, 2 Curt. 458; *Re Beavan*, 2 Curt. 369; *Re Ibbitson*, 2 Curt. 337; *In the Goods of Horsford*, L. R. 3 P. & D. 211.)

It is insisted by the appellant that, as the statute provides for the partial revocation of a will by its being destroyed, the word destroyed cannot mean annihilated, but is sufficiently answered by what was done in this case. It is apparent, however, that there may be a destruction of a particular part of a will by erasure or complete obliteration, and that, admitting that *destroyed* does not, as used in the statute, mean *annihilated*, it does not follow that a will may be destroyed by simply drawing a scroll through the signature. The most that can be said for what was done in the present case is, that it constitutes a cancellation of the signature not rendering it illegible, and, as it was not witnessed in the manner required by section 2330 of the Code, it is inoperative. The court did not err in directing a verdict for the defendant.

The plaintiff introduced as a witness one Paul Carrel, and offered to prove by him that, in the early part of 1878, decedent had a conversation with the witness, in which he went over the question of his property, and in his conversation, referring to the terms of what he claimed to have been his will, said that he had destroyed it, that the law would make a proper distribution of his property to suit him, and that his wife would now get, under the law, what she would have got under the old will, and that he had destroyed his will and should not make another. The plaintiff, also, introduced one Kenedy, and offered to prove by him that he had a conversation with Mr. Gay, about two weeks prior to his death, with reference to the disposition of his property, in which he said that he had destroyed his will; that he had made a will at one time, but had since destroyed it; that at the time he made his will he desired his wife to have all the property he had; that since that time his property had more than doubled, and that now, if he should die, his wife would get as much as she

would at the time he made his will, if she had got it all; that he did not propose to go back on his mother; that he ought to do something for her, and that he had destroyed his will and should not make another. The defendant objected to this testimony and the objection was sustained. The appellant assigns this action of the court as error. The statute requires that the act of destruction or cancellation which will work a revocation of a will, must be done with the intention of revoking it. When the act is sufficient to work a revocation, if done with that intent, the declarations of the testator may be admissible to show the intent. (See *Bibb v. Thomas*, 2 W. Black, 1043; *Harring v. Allen*, 25 Mich. 505; *Sawyer v. Smith*, 8 Mich. 411.) When, as in this case, however, the act done does not amount to a revocation, the declarations of the testator are not admissible to prove a revocation. (Redfield on Wills, p. 331; *Staines v. Stewart*, 8 Jur. N. S. 440; *Waterman v. Whitney*, 11 N. Y. 157; *Doe d. Shallowcross v. Palmer*, 16 Q. B. 747; *Jackson v. Kniffen*, 2 Johns. 31.)

The court did not err in rejecting the proffered testimony.
Affirmed.

See *Woodfill v. Patton*, 2 Am. Prob. R. 200; *Lovell v. Quitman*, Id. 351.

MILBURN vs. MILBURN.

[60 Iowa, 411.]

REVOCATION OF WILL BY SUBSEQUENT BIRTH OF ILLEGITIMATE CHILD.

The birth and recognition of an illegitimate child subsequent to the execution of a will by the father revokes such will.

PROCEEDINGS to probate a writing as the last will of Hosea Milburn.

J. B. Young, for appellant.

Blake & Hormel, for appellee.

SEEVERS, Ch. J. The plaintiff pleaded the will should not be admitted to probate, because: "Since the making of said pretended last will and testament, to wit, on or about the — day of September, A. D. 1874, at the residence of the said Hosea Milburn, in said county of Linn, this contestant was born; that she is the daughter of the said Hosea Milburn by Mary E. Baird (now Mary E. Brown), and was recognized by the said Hosea Milburn as his child, and such recognition was general and notorious."

This defense was overruled, and the only question to be determined is whether the court erred in so doing.

It must be regarded as the settled rule in this State, that the birth of a legitimate child to the testator, subsequent to the making of a will and before the testator's death, will alone operate as an implied revocation of the will. (*McCullom v. McKenzie*, 26 Iowa, 510; *Negus v. Negus*, 46 Id. 487; *Fallon v. Chidester*, Id. 588.)

It is provided by statute: "Illegitimate children inherit from their mother, and the mother from the children. They shall inherit from their father, whenever the paternity is proved during the life of the father, or they have been recognized by him as his children, but such recognition must have been general and notorious, or else in writing." If the recognition is mutual, a father may inherit from his illegitimate child. (Code, §§ 2465, 2466, 2467.)

Counsel agree that at common law an illegitimate child could not inherit from either parent. This being so, it is evident that the common law rule has been radically changed by statute; for, under the statute, such a child may inherit from its mother as if it was legitimate. If there are both legitimate and illegitimate children, they inherit from their mother share and share alike, and if an illegitimate child has been recognized by its father, it will inherit from him share and share alike with the legitimate children. For the purpose of inheritance, an illegitimate child, when recognized by its father, stands on precisely the same footing as if it were legitimate. If the father died intestate, both inherit, and such right can only be cut off by a will of the father which is equally effectual as to

both classes of children. The birth of a legitimate child entitles it to inherit, but this is not so as to an illegitimate child. For mere birth does not entitle the latter to inheritance, but the notorious recognition does. Such recognition legitimatizes the child. In the case at bar the testator, after making the will, recognized the plaintiff as his child. This being so, the statute provides that the right to inherit shall from that time exist. It follows that the plaintiff could only be deprived of such right in the same manner as a legitimate child, and that is by a will executed subsequently to the birth of the child. The statute does not provide that the birth of a child subsequently to the execution of a will has the effect to revoke it. In this respect the statute makes no difference between different classes of children.

In *Kent v. Barker*, 2 Gray, 535, the question was whether the term "children" in a statute of Massachusetts included illegitimate children, and it was held it did not. This case has but little if any bearing on the question before us. Beside this, we have construed the word children as used in section 2437 of the Revision (Code, § 2454), so as to include an illegitimate child. (*McGuire v. Brown*, 41 Iowa, 650.) It seems to us the statute under consideration leaves no room for construction, and as the rule is that the birth of a legitimate child, after the execution of a will by its father, has the effect to revoke a will, that, under the statute, the same result must follow the birth and recognition of an illegitimate child.

Reversed.

DAVIS' APPEAL.

[100 Penn. St. 201.]

LIFE ESTATE IN INCOME OF PERSONALTY.

A direction by testator that the entire principal of his estate, which consisted of personalty, should be securely invested, and so remain during the lives of his children and two grandchildren, who should receive the income in equal

shares, and upon the death of any one of them the survivors should receive the entire income, and, when all were dead, the fund should be divided amongst the testator's heirs, creates a life estate in the children and grandchildren, and the principal property goes to the executors upon the trusts.

APPEAL from the Orphans' Court of Philadelphia county.

John Davis died in August, 1879, leaving him surviving his widow, two sons, two daughters, and two grandchildren, descendants of a deceased son, Robert P. Davis.

In his will, after devising all his estate to his wife for life, testator continued :

"Item. Immediately after the death of my beloved wife Maria Davis, I desire and will that the principal of all my estate be and remain securely invested, and that all of the interest or income of said estate be given to and equally divided between my children and my two grandchildren share and share alike, the two latter being children of my son Robert P. Davis, deceased.

"Item. Upon the death of one or more of the above children and grandchildren 'tis my desire and will that those remaining shall receive the whole of the interest or income of my estate share and share alike.

"Upon the death of all of the above children and grandchildren then 'tis my will that the principal of my estate be divided amongst my lawful heirs."

Testator's widow died in October, 1879.

Benjamin H. Brewster, for appellant.

GREEN, J. The very able argument of the learned counsel for the appellant has not convinced us of any error in the decree of the court below. Under the will of John Davis, Sr., the trustee was not the mere recipient and passive holder of the legal title, without duties to perform. The entire principal of the estate was to be securely invested and so remain during the lives of all the children, and the two grandchildren, and the income to be paid to them in equal shares. Upon the death of any one of the children or grandchildren, those who survived were to receive the entire income of the fund,

and when all were dead the fund itself was to be given to the lawful heirs of the testator. Who the lawful heirs of the testator may be, is of course very uncertain, but they cannot possibly be any of those who are to receive the income of the fund, because these must all be dead before the gift over can take effect. There is, therefore, a duty to preserve the estate, in order that it may be divided amongst those who are entitled after all who have received the income shall have died. Moreover this duty is absolute. It is not in any sense discretionary with the trustee. Nor is there any power of disposal by will vested in the *cestuis que trust* for life. And in addition to this there is a previous estate for life in the widow, in the entire estate of the decedent real and personal. The lawful heirs of the testator are not necessarily, by any means, the same persons as the lawful heirs of his children and grandchildren. In all these respects the case differs from those in which the rule prevails that the gift of the produce of a fund is the gift of the fund itself. That rule is very carefully stated by the present chief justice in *Keene's Appeal*, 14 P. F. S. on p. 274, thus: "It is unquestionably a well settled rule that although the interest only of a fund be bequeathed, yet if the bequest be indefinite and without an ultimate limitation over, it will carry the principal absolutely." As stated by Mr. Justice Kennedy in *Hellmans v. Hellman*, 4 Rawle, 450, it is subjected to the expression of a contrary intention by the testator. Thus Kennedy, J., says: "*Prima facie* a gift of the produce of a fund is a gift of that produce in perpetuity; and it is consequently a gift of the fund itself, unless there is something upon the face of the will to show that such was not the intention." In *Keene's Appeal* the limitation over, although to the lawful issue of the legatees of the interest, was held a sufficient expression of an intention that the brothers were to take for life only. In the present case the testator expressly directs that upon the death of one or more of the grandchildren, those who remain shall take the whole of the interest in equal shares, and this process is to continue until all are dead. This is a clear limitation of the right to the interest during the lives of the children and grandchildren in succession until all are dead,

and excludes the idea of an absolute estate in the principal in the whole body of the legatees. If such an estate were to pass it would defeat the right of the survivors in succession, of those who died, to the whole of the interest, and thus work a result contrary to the express words of the bequest. But there is beyond this a limitation over after the death of all the legatees of the interest, of the whole principal of the fund, to a well defined class of persons who can readily be ascertained. If the children and grandchildren die leaving lineal descendants, such descendants will be the lawful heirs of the testator. But if they all die without leaving any descendants, then the fund, being personal estate, goes, not to the next of kin of the children and grandchildren, which would include relations on the mother's side, but, by force of the limitation of the will, only to such of the next of kin as would inherit from the father. It is clear then, that in order to preserve the estate for the uncertain persons who are to take it after the death of all the legatees for life, it is necessary to continue the legal estate in the trustee to enable him to perform his duties. In *Bacon's Appeal*, 7 P. F. S. 504, the subject of the trust was real estate which was given to trustees, who were to receive the rents and income thereof, and pay it over to the daughters during life, and after the death of the daughters and their husbands to convey it to the right heirs of the daughters in fee. On p. 512, Strong, J., said: "Had the trust no other object than the special one of protecting the property for the separate use of the daughters, it might have been left as it was first constituted. The imposition of a duty to receive and pay over the income would have been needless. But the injunction of active duties during the life of each daughter evinces a purpose begun, that of maintaining separate uses. It involved the necessity of management and care of the real estate, and of preservation for those entitled in remainder. * * * So long as active duties remained to be performed by the trustees, the legal estate must continue in them to enable the performance." This being true of real estate which is permanent and enduring and requires no change, it is still more true of a trust fund which consists of securities only (in this case stocks and

bonds) requiring constant care and watchfulness, and possibly frequent changes. It is absolutely essential in such a case, if the trust is to be performed at all, that the estate of the trustee should be continued until the trust itself has expired by the limitations of the will. It is almost needless to add that the interest of the legatees for life is an equitable one, and that of those in remainder a legal one, since as to the latter nothing is to be done but to divide among them the principal of the fund.

On the subject of commissions we see no sufficient reason for interfering with the action of the auditing judge and the Orphans' Court. In view of all the circumstances it is not clear that the amount allowed was unreasonable.

Decree affirmed at the cost of the appellant.

HAWKINS vs. GARLAND.

[76 Virginia, 149.]

LATENT AMBIGUITY AS TO PERSON OF LEGATEE.—PAROL EVIDENCE ADMISSIBLE.

Where a bequest is made by testator to his namesake "S. G., son of Captain J. F. S.," evidence is admissible to show that one S. G., a son of J. F. S. was not in existence at the date of the will, and that testator knew and referred to "S. G., son of Captain J. F. H."

THE opinion states the facts.

L. D. Haymond and *J. B. Brockenbrough*, for appellant.

Jubal A. Early, for appellees.

CHRISTIAN, J. This case is before us on appeal from a decree of the Circuit Court of the city of Lynchburg.

The facts disclosed by the record, so far as necessary to be noticed in this opinion, are as follow :

Samuel Garland, Sr., departed this life in November, 1861. He left a will written wholly by himself, which bears date the 7th of December, 1857. He left a very large estate, valued at nearly \$800,000. He left a widow, but no issue. His next of kin consisted of a number of nephews and nieces, to all of whom he left liberal bequests.

The question in this case arises under the 15th clause of said will, which in its numerous provisions is the only one necessary to be noticed in deciding the controversy in the court below, and which is now brought before this court for review. That clause of the will is in these words: "15th. I give to each of my *namesakes*, Samuel G. Slaughter, son of Ch. R. Slaughter; Samuel G. White, son of Samuel G. White; Samuel, son of S. Garland, Jr.; and *Samuel G., son of Captain John F. Slaughter*, a bond of one thousand dollars of S. S. railroad."

The record further conclusively shows that at the date of the will, to wit, the 7th of December, 1857, there was no such person in existence as "Samuel G. Slaughter, son of Captain John F. Slaughter," and no such person was in existence until three or four years after the date of said will. Then there was born to John F. Slaughter a son whom he named Samuel G. Slaughter.

The proof in the cause further shows conclusively that John F. Slaughter never was known to the testator, or called by him "Captain" John F. Slaughter, and that he had no such title, and was known and called by the testator simply Jack Slaughter. He had no such title as *captain*, was never known or called as such either by the testator or any other person, and at the date of the will he had no son named "Samuel G. Slaughter."

All this is admitted by the answer of John F. Slaughter.

Without going further into the proofs in the cause it is manifest that there was a misdescription of the person named in the 15th clause of the will as a legatee of the bond of \$1,000 in the said clause mentioned.

The legacy is to a *namesake*. That namesake is described as *Samuel G., son of Captain John F. Slaughter*. There was no such namesake in existence at the time of the execution of the

will. There was no such person known to the testator as *Capt. John F. Slaughter*, and John F. Slaughter, whatever his title, had no such son, and did not for years afterwards have a son named after the testator, Samuel Garland.

The case presented upon these facts is one of a latent ambiguity within the very definition of the authorities.

As defined by Lord Bacon, "a latent ambiguity is that which seemeth certain and without ambiguity for anything that appeareth on the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity." (See Bacon's Law Torts, p. 99.)

A latent ambiguity therefore exists in a sentence or expression only when the real meaning or intention of the writer is hidden or concealed. It does not appear on the face of the words used, nor is its existence known until those words are brought into contact with collateral facts. It is only when you come to apply the words, bringing them alongside the facts which existed when used, and to read them in the exact light in which they were written, that you make up the latent ambiguity, if one exists. (Bacon's Max. 23; Green. Ev. §§ 297, 298; Brown's Legal Maxims, p. 441.)

The case before us, therefore, is one of latent ambiguity where there is nothing ambiguous in the words used, but where the extraneous evidence shows that the person named in the testator's will as the object of the testator's bounty, is not in fact the person to whom the testator intended to make the bequest. It was simply a misdescription of that person, made inadvertently by a *slip of the pen* in writing the name and designation. This is the more manifest when it appears that in the testator's will he made another mistake as to the name designating the objects of his bounty, and no controversy is made with respect to the mistake of the name in that case, where he designates the legatee as Samuel *Garland*, brother of Ch. R. Slaughter, when it seems manifest he meant to write Samuel Slaughter. (See 14th clause of will.)

Where there is a misdescription in a will, either of the *person* to whom the devise or legacy is given, or of the subject-matter of the bequest or devise, extraneous evidence is always

admissible to show the person who was the object of the testator's bounty, or the property actually devised or bequeathed. When there is doubt as to whom the legacy or devise was intended, or where there is a misdescription of the property devised or bequeathed, extraneous evidence is always admissible to show the real party to whom the devise or bequest is made, and the specific property which the testator intended to devise or bequeath. This is familiar law, and sustained by all the authorities.

I think it must be conceded that the extraneous evidence clearly shows that in the testator's will there was a misdescription of the legatee, one of the subjects of his bounty, when he designates him as "Samuel G., son of Captain John F. Slaughter," and especially when he designates him as one of his *namesakes*. As already seen, there was no such person as "Samuel G. Slaughter, son of Captain John F. Slaughter," in existence at the time of the execution of the will. I think, therefore, that it is perfectly plain from the will and the evidence in the cause that Samuel G. Slaughter is not entitled to receive the legacy of \$1,000, and that he, upon the proofs in the cause, does not answer to the description contained in the 15th clause of the will of the testator.

I think, upon the record, that this is too plain for argument, and the concession in the answer of John F. Slaughter that he did not have any son named after the testator, and not until years after the date of the will, is conclusive of the case in this respect.

The fact that years after the execution of the will he had a son whom he named after the testator does not at all affect the construction of the will. Properly to construe that will, we must put ourselves in the place of the testator and inquire who were the objects of his bounty under the 15th clause of his will. Assuming that position, we are bound to say that the son of John F. Slaughter did not answer to the description of the testator as his *namesake*, for he was not then born, and not born until years afterwards; and he was not the son of *Captain* John F. Slaughter, for there was no such person known to the testator. It is very plain, therefore, that the son of Captain

John F. Slaughter is not entitled to receive this legacy for the reasons already stated, there being plainly a misdescription of the person to whom the legacy was given in the 15th clause of said will.

But the main and important question is, *to whom* shall this legacy be paid? Shall it lapse because there is no hand to receive it, and no legatee to whom it shall be paid?

Courts are always averse to permitting a legacy to lapse if it can be found who was the legatee intended by the testator to be the object of his bounty. In this respect, as in all other questions concerning the construction of wills, the prime object is to find out the intention of the testator, and the courts will never permit a legacy to lapse if, upon a fair construction of the will and seeking to carry out the intention of the testator, it can find who was the legatee the testator intended to make the object of his bounty.

In this case it is plain that a latent ambiguity exists and is established by extrinsic evidence. Such ambiguity thus established by evidence *dehors* the will may be removed in the same manner by extrinsic evidence.

I can find no case, English or American, after a careful examination of the authorities, where after a latent ambiguity has been certainly established, evidence was rejected which tended to show the real intention of the testator and which was necessary to carry that intention into effect.

As was said by Lord Thurlow in *Baugh v. Read*, 1 Ves. Jr. 257, "where a testator uses certain words which *prima facie* give a clear account, the same fact that enables you to prove that there was a latent ambiguity enables you to prove also what was his real intention."

In the old case of *Beaumont v. Fell*, 2 Peere Williams, 141, which was one of the first cases in which parol evidence was admitted in aid of construction, it was held that whenever the testimony raised an ambiguity, evidence *dehors* the will was received to show what the words used really and in fact meant.

This case, often commented upon by the English judges, has never been departed from, but the principle therein de-

clared has been universally recognized. (See Jarman on Wills, ch. 14, 3d Am. ed., and numerous cases there cited; *Good v. Needs*, F. M. & W. 139; *Hiscock v. Hiscock*, 5 M. & W. 863; *Wynn*, 252, and cases there cited; *Careless v. Careless*, 1 Mer. 384.)

In the last-named case it was held that "identification of the devisee is virtually left wholly to parol."

That case is singularly like the one under consideration. The legacy there was to the testator's nephew Robert, the son of Joseph C. The testator had two nephews called Robert, the one the son of his brother John C., the other, the son of his brother Thomas C. The testator had no brother Joseph, nor was there any other Joseph C. This was held by Sir William Grant to be a latent ambiguity, and that the writing of the word Joseph instead of Thomas was a mere slip of the pen. (See also in this connection Jarman on Wills, ch. 14, 3d Am. ed., 361; 2 Taylor on Ev. §§ 1220, 1226; Wigram on Wills, 285-6.) See also the leading cases of *Hiscock v. Hiscock*, 5 M. & W. 863, in which the principal English cases on the subject are elaborately reviewed by Lord Abinger, and where it was held that evidence was admissible, not for explaining the words or meaning of the will, but either to supply some deficiency or remove some obscurity or ambiguity. Where, for instance, the devise was on the face of it perfect and intelligible, but from some of the circumstances admitted in proof an ambiguity arose as to which of the two or more persons or things the testator intended to express.

The cases in our own court establish the principle settled by the English court, that where a latent ambiguity has been established by evidence *dehors* the will, extrinsic evidence may also be received to remove the ambiguity and to show the real intention of the testator.

In *Maud's Adm'r v. McPhail*, 10 Leigh, 199, the testator devised all his negroes "to the agent of The New Colonization Society in Africa." Parol evidence was admitted to show that the society meant was "The American Colonization Society," and that McPhail was the agent of that society, and that he was the person to whom the bequest by the testator was intended to be given. And that intention was proved in this

case by the declarations of the testator made to a witness, and it was upon this evidence that the legacy was upheld by this court and a decree rendered delivering the slaves to McPhail as the agent of "The American Colonization Society."

In the case of *Roy's Ex'or v. Rowzie*, decided by this court as late as 1874, it was held that a bequest to "The Baptist Theological Seminary in South Carolina" was, upon evidence, intended by the testatrix to be a bequest to "The Southern Baptist Theological Seminary;" and one of the principles emphatically declared in that case was that "Where the person or object or subject referred to in a bequest is uncertain, or does not answer precisely the description given them in the will, or where there are two or more objects which answer equally the description, resort must be had to parol evidence and the surrounding circumstances to show what the testator intended by the expressions which he used; and if such intention is so ascertained with sufficient certainty the bequest is valid."

Judge Moncure, in delivering the unanimous opinion of the court in this case, said: "Parol evidence is always admissible and even necessary to lead us to the person or object and subject referred to in a bequest. The court of construction, with the testator's will in hand, looks for the object of his bounty and the thing intended to be given, and expects them to answer precisely the terms of description given of them in the will. Generally they do, and there is no difficulty. Often they do not. * * * In such cases resort must be had to parol evidence and the surrounding circumstances to show what the testator intended by the expressions which he used; and almost always his intention is thus ascertained with sufficient, if not with unerring, certainty. If it cannot be, the bequest must then fail of effect; but the court is always reluctant so to declare. It will not require that the object or subject shall have every ear-mark given to it by the testator. Nay, it may in some instances have different ear-marks, and yet the description contained in the bequest may be sufficient to give it effect. *Falsa demonstratio non nocet cum de corpore constat*, is a max-

in which expresses a rule of construction to which the court has frequent recourse in such cases."

Applying these principles to the case before us, I think it is clear that (there being no such person as Samuel G., son of Captain John F. Slaughter, in existence at the time of the execution of the will), the evidence in the cause plainly points to the appellant, Samuel G. Hawkins, as the object of the testator's bounty and the person to whom he intended to give the legacy of \$1,000 by the fifteenth clause of his will.

He was the *namesake* of the testator, named Samuel Garland. He was the son of his intimate friend, Captain John F. Hawkins. He answers to the description in the will—as (1) my namesake, Samuel G.; (2) as the son of Capt. John F.

Now, if the word Hawkins had been written instead of "Slaughter," the appellant would have answered the full description of the person intended as one of his legatees.

It is manifest, from the evidence of the testator's widow and his relative and intimate friend and counsel, Judge Garland—whose evidence we think admissible after the establishment of the latent ambiguity heretofore referred to—that the testator intended to write the words Samuel G., son of Capt. John F. Hawkins, instead of the words Samuel G., son of Capt. John F. Slaughter; and that it was a mere slip of the pen when the word Slaughter was written instead of Hawkins, as in the case of *Careless v. Careless* (*supra*), the word Joseph was said by Sir William Grant to be a slip of the pen for John. The venerable Judge Garland, the intimate friend of the testator, was told by the testator that Capt. John Hawkins had a son named after him, and that he had selected three or four of his *namesakes* to whom he had given \$1,000 each, and he is positive that Samuel Garland Hawkins was one of the namesakes mentioned by him. This is confirmed by the evidence of the widow of Samuel Garland.

The writing of the name of *Slaughter* instead of *Hawkins* is the more manifest when it appears that the name of Slaughter occurs seven times in the will of the testator as different devisees and legatees.

And it is a pregnant fact that, except in the fifteenth

clause, John F. Slaughter is never spoken of as *Capt.* John F. Slaughter, nor did the testator in his lifetime ever call him by that title. But, on the other hand, John F. Hawkins was always known and called by the testator and other persons as "Captain," which was in fact his title.

I am of opinion, therefore, that inasmuch as at the time of the execution of the will there was no such person in existence as "Samuel G., son of Capt. John F. Slaughter," he, it is plain, could not take the legacy. And I think it is equally clear upon the evidence that the person to whom the testator intended to give, and did in fact give, the legacy mentioned in the fifteenth clause of the will, was Samuel G., son of Capt. John F. Hawkins, the appellant in this cause, and that the said legacy ought to be decreed to him.

I am, therefore, of opinion that the decree of the said Circuit Court of Lynchburg be reversed.

Decree reversed.

Latent ambiguity as to person of devisee.—Parol evidence cannot be admitted to supply or contradict, enlarge or vary the words of a will, nor to explain the intention of the testator, except in two specified cases. 1. Where there is a latent ambiguity arising *dehors* the will as to the person or subject meant to be described, and 2, to rebut a resulting trust. All the cases profess to proceed upon one or the other of these grounds. *Mann v. Mann*, 1 Johns. Ch. 281; 14 Johns. 1 (Chas. Kent).

This is said to be the leading American case.

Lord Bacon introduces the distinction between latent and patent ambiguity into the rules of pleading, and it was later transferred into the law of evidence, where it is neither a philosophical, a substantial, or a useful distinction. *Clayton v. Lord Nugent*, 18 M. & W. 206 (by Alderson, B.); *Cicero Q. Tusc.* III, 9; *Grant v. Grant*, L. Rep. 5 C. P. 380. See, also, *Bacon's Maxims*, Reg. 28, 25; *Bacon's Law Tracts*, 99.

There must be a *real* ambiguity. Parol evidence is not to be admitted by way of conjecture where the uncertainty is absolute, and identification impossible. *Lefevre v. Lefevre*, 59 N. Y. 434; *Smith v. Smith*, 4 Paige, 270; *Armistead v. Armistead*, 32 Georgia, 597; *Weatherhead v. Sewell*, 9 Humph. 272; *Healy v. Healy*, 9 Ir. R. Eq. 418; *Doe v. Chichester*, 3 Taunt. 147.

The duty of the court is one of *interpretation*, not one of formation or revision. *Warren v. Gregg*, 116 Mass. 304; *Best v. Hammond*, 55 Penn.

St. 409; Gilliam v. Chancellor, 48 Miss. 437; Rutherford v. Morris, 77 Illinois, 397.

Statements of *intention*, *dehors* the instrument, are not to be received. This is the rule. Wallize v. Wallize, 55 Penn. St. 242; Tucker v. Seaman's Aid Society, 7 Metc. (Mass.) 188; Stringer v. Gardiner, 27 Beav. 35; Sherratt v. Mountford, L. R. 8 Ch. 928; Sullivan v. Sullivan, 4 Ir. R. Eq. 457; Hiscocks v. Hiscocks, 5 M. & W. 363; Doe v. Martin, 4 B. & Ad. 771.

But where the description given by the testator applies equally well in all its parts to two or more persons or things, evidence of the statements of the testator may be given to show his intention as to the disposition of his property. Cleverly v. Cleverly, 124 Mass. 314; Pickering v. Pickering, 50 N. H. 349; Knight v. Knight, 30 L. J. Ch. 644; Doe d. Good v. Need, 2 M. & W. 129; Cronise v. Louisville Orphans' Home, 3 Bush (Ky.), 371; Graydon v. Graydon, 8 C. E. Gr. (N. J.) 230.

The same rule applies where two or more objects answer partially and none perfectly the description in the will. Boggs v. Taylor, 26 Ohio St. 604; Bible Soc. v. Pratt, 9 Allen, 109; Orphan Asylum v. Emmons, 3 Bradf. 144; Webber v. Corbett, L. R. 16 Eq. 518.

"The only cases in which evidence to prove intention is admissible are those in which the description in the will is unambiguous in its application to each of several subjects." Lord Abinger in Hiscocks v. Hiscocks, cited above.

Where the language of the will is capable of a rational interpretation of itself, neither the testator's declarations of what he meant, nor the testimony of the draftsman as to the meaning of a clause, nor a letter to the testator from his solicitor, is competent evidence. Wilson v. O'Leary, L. R. 7 Ch. App. 448; Provis v. Reed, 3 M. & P. 4; Thomas v. Thomas, 6 T. R. 671; Whitaker v. Tatham, 7 Bing. 628; 5 M. & P. 628.

When a will is written in a foreign language, a translation is competent. Clayton v. Lord Nugent, cited above.

Where there is a contradiction in terms of settled legal import, it must be explained by the rules of interpretation, and extrinsic evidence is not competent. Weatherhead v. Baskerville, 11 How. (U. S.) 329.

Initials and ciphers may be explained by parol where such explanation is possible, *e. g.*, a bequest to — Page, may be explained (Price v. Page, 4 Ves. 679), because such a designation is capable, ordinarily, of some explanation; but a gift to Lady —, is void for an obvious reason. Hunt v. Hart, 3 Bro. C. C. 311; Kell v. Charmer, 23 Beav. 195.

Evidence as to the condition of the testator's family, property, etc., is admissible to explain a latent ambiguity. Dornall v. Adams, 13 B. Mon. 273; Travis v. Morrison, 28 Alabama, 494; Wooten v. Read, 12 Gratt. 196; Bond's Appeal, 31 Conn. 90; Richards v. Miller, 62 Illinois, 417; Blundell v. Gladstone, 1 Ph. 279; 12 L. J. Ch. 226; Camoys v. Blundell, 1 H. L. Cases, 778.

The question of latent and patent ambiguities, arising in contracts or other writings *inter vivos*, is less likely to be of paramount importance, and less latitude is allowed usually in construing such instruments than prevails in the case of wills. See Wigram's Propositions, II; Wells v. Wells, L. R. 18 Eq. 505; Grant v. Grant, L. R. 5 C. P. 727; City Bank v. Adams, 45 Maine, 175, 455; Shaw v. Shaw, 50 Id. 94; Board of Education v. Keenan, 55 California, 642; Goff v. Roberts, 72 Missouri, 570; Bradley v. Wash., etc., Co. 18 Peters, 89; U. S. v. Peck, 102 U. S. 64; Jackson v. Perrine, 35 N. J. Law, 137; Elliott v. Horton, 28 Gratt. 766.

FLINN vs. FLINN.

[4 Delaware Ch. 44.]

ALLOWANCE FOR SUPPORT OF INFANT OUT OF INTEREST ON LEGACY PAYABLE AT MAJORITY.

An allowance may be made for maintenance and education out of the interest upon legacies payable to infants at their majority, with limitations over in case of death under age.

BILL in equity by the two children of Lewis C. Flinn to compel the latter's executors to pay annually the accrued and accruing interest on legacies, held for the benefit of certain children, to their guardian, to be applied to their maintenance and education.

The testator's will read:

"Item. I will and bequeath to my lawful issue (if there be any, and if such live to arrive at the age of twenty-one years) the remaining two-thirds of said residue or remainder of my estate, share and share alike, to them, their heirs, and assigns forever."

"Item. It is my will that the legacies due to minors be held in the hands of my executors at five per cent. per annum from one year after my decease, to be paid to them as they severally arrive at the age of twenty-one years."

"Item. But in case of the death of any of the minor heirs while in their minority, then their share of my estate shall be

equally divided among my surviving brothers and sisters or their lawful issue share and share alike, and I constitute and appoint Joanna Flinn (my wife) and John J. Flinn and Evan T. Flinn executors of this my last will and testament."

Lore, for complainants.

S. M. Harrington, for defendants.

THE CHANCELLOR. It has always been the policy of courts of equity to make legacies to infant children available for their maintenance during their minority. In order to accomplish this desirable end, such legacies have been made an exception to the general rule as to the time from which interest begins to run upon a legacy. It has therefore been uniformly held that legacies to infant children carry interest from the death of the testator and not from a year after as in other cases. (2 Roper on Leg. ch. 20, p. 1245 and note, p. 1257 *et seq.*; *Beckford v. Tobin*, 1 Ves. Sr. 308; *Hill v. Hill*, 3 Ves. & B. 183; *Macpherson on Infants*, 234-41.)

The same principle has been indirectly recognized, very emphatically, in cases where this exception has been referred to for purposes of illustration. (*Lowndes v. Lowndes*, 15 Ves. 301; *Raven v. Waite*, 1 Swanst. 558; *Crickett v. Dolby*, 3 Ves. 17.)

This exception to the general rule holds good, whether the testator has expressly directed the maintenance of the children or no. (*Pett v. Fellows*, 1 Swanst. 561, note.) If no maintenance is provided, then the court will give interest for the purpose of securing maintenance and, as appears from the cases already cited, the interest commences from the death of the testator, because then the necessity arises. The interest is allowed because the court presumes it to have been the intention of the testator to provide for the maintenance of his child. (*Leslie v. Leslie*, Lloyd & Gould, 1, and note.) So if the testator expressly directs maintenance out of the legacy or its income, the direction will be held to apply from the time of his death. In the case of children, it is immaterial whether there

is a direction for maintenance or no. The only distinction drawn between the two classes of cases, where maintenance is directed and where it is not, is that in the case of natural children and in other cases where the testator puts himself in *loco parentis*. If maintenance be directed, the exception is extended to cover these cases and the interest runs from the testator's death. (*Newman v. Bateson*, 3 Swanst. 689; *Dowling v. Tyrell*, 2 Russ. & Myl. 343; *Wilson v. Maddeson*, 2 You. & Coll. 372.) The American cases lay more stress upon the circumstance that there is no other provision for maintenance for the child, and in such cases interest is uniformly given and allowed from the death of the testator. This doctrine is very well stated by Judge Story, in *Sullivan v. Winthrop*, 1 Sumn. 13, thus: "There are exceptions to the general rule, as to interest on legacies: one is, where a legacy is given by a parent to an infant child, who is otherwise unprovided for; for there, upon the presumed intention of the parent to fulfill his moral obligation to maintain his child, interest will be allowed, from the death of the testator, as a maintenance for the child, when no other fund is applicable for such maintenance. And this is equally true whether a future time is fixed for the payment of the legacy or no time is fixed by the will."

To the same effect says Chancellor Kent, in *Lupton v. Lupton*, 3 Johns. Ch. 628: "With respect to the question of interest it may be proper to observe, that the general rule is, that a legacy payable at a future day does not carry interest until after it is payable, unless it be a legacy to a child payable at a future day, and the child has no other provision, nor any maintenance, in the meantime, allotted by the will. If there be no such provision, the legacy carries interest immediately, on the presumption that the parent must have intended that the child should, in the meantime, be maintained at his expense."

In *Hite v. Hite*, 2 Rand. 409, the legacy was \$1,000 each to thirteen children, with direction to the executors to sell the estate and pay debts and legacies, and the residue was bequeathed to the same legatees; there was no other provision for children. Interest was decreed to the children from the

death of the testator. *Eyre v. Golding*, 5 Binney, 475, is a case resting upon the same principles as those last cited.

It will be observed that in these cases, as in the present one, there was in the will no provision for the children, except the legacies under consideration. The decisions go somewhat beyond the necessary application of the law to those cases, in saying that the absence of any other provision is necessary to bring the legacy within the exceptions as to interest, and to entitle the legatee to interest from the death of the testator. It may be remarked that the English cases, some of which I have referred to, and very many more it is unnecessary to cite, do not lay the same stress upon this circumstance, and it may be questioned whether they sustain the limitation set up in these American cases. Suffice it to say that this particular point is not necessary to be considered here, and therefore should not be determined,—because, in the will of their father, the complainants are wholly unprovided for otherwise than by these legacies.

A feature of this case, however, which should be adverted to, is the limitation over. In many cases which have been adjudicated upon this subject the same feature was present. In none of them is it treated as any objection to the relief sought. Such legacies have been uniformly treated as vested legacies subject to a subsequent condition. *Harvey v. Harvey*, 2 P. Wms. 20, is a case almost identical as to facts. In *Bitzer's Ex'r v. Hahn and wife*, 14 S. & R. 232, a legacy to children and grandchildren, limited over on the death of any one without issue, or under age, was held to be not contingent, but vested *in præsenti*, liable to be divested on the happening of a future contingency, in which case, it is said by the court, the Court of Chancery always decrees interest until the infant comes of age. A similar case was *Taylor v. Johnson*, 2 P. Wms. 504.

The principle of treating as children, in this respect, those to whom the testator stood in *loco parentis*, has been extended to cover legacies to a niece, where payment was to be made when the legatee married or arrived at the age of twenty-one,

with a limitation over. (*Archerly v. Wheeler*, 1 P. Wms. 783; *Nichols v. Osborne*, 2 Ib. 419.)

From many of the cases already cited, as well as many others which might be referred to, there can be no doubt of the power of this court to decree the application of interest upon such legacies to the maintenance of the children.

The only points upon which any argument might be made, as to the effect of the authorities, are, how far the exception in favor of children may be extended beyond children to those to whom the testator stands in *loco parentis*, and whether, if there be any other provisions in the will, the case may still be treated as within the rule allowing interest from the death of the testator. In the present case neither of these questions arise.

Nor is there any question here as to the allowance of interest or as to the time; the only question here is as to the power of this court to decree the application of that interest to the maintenance of the children. The cases cited simply show how much farther the courts have gone than is necessary to afford the relief now prayed.

I am therefore of opinion, that, in equity and according to the true intent and meaning of the testator, in the bequests made to his children, they are entitled to be allowed out of the annual interest of their respective shares a sum sufficient for their maintenance and education during their infancy.

The excess of interest on their respective shares above one hundred dollars appears from the bill and answer to be necessary for that purpose, and that portion of the interest, accrued and to accrue, will be directed to be paid to their guardian for that purpose.

POMEROY vs. MILLS.

[37 New Jersey Eq. 578.]

UPON WHAT COMMISSIONS ALLOWED.—WHAT IS “FINAL SETTLEMENT.”

There may be a “final settlement” of executor’s accounts though it appear that further property may come to hand for distribution.

Commissions may be charged on the gross value of stocks belonging to testator but held by his brokers and subsequently sold by them to repay advances.

Commissions may be allowed on any personal property coming to hand that has a money value.

Commissions can only be allowed for what has been done and not for what may be requisite to fully execute the will.

THE opinion states the case.

J. E. Ward and *J. D. Bedle*, for appellants.

H. C. Pitney and *Barker Gummere*, for respondent.

DIXON, J. This is an appeal from an order of the Prerogative Court, reducing the commissions of executors as allowed by the Orphans’ Court of Morris county. The appellants, residuary legatees under the will, complain that the allowance is still too large. The respondent, one of the executors, contends that the order of the Prerogative Court is not appealable. In *Anderson v. Berry*, 2 McCart. 232, it was decided that an appeal lies to the Prerogative Court from an order of the Orphans’ Court fixing the amount of executors’ commissions, the decision resting upon the language of the constitution, that “all persons aggrieved by any order, sentence or decree of the Orphans’ Court may appeal from the same, or any part thereof, to the Prerogative Court.” By a supplement to the Prerogative Court act, approved February 17th, 1869 (Rev. p. 221), the right of appeal from that court to this was conferred in identical terms upon “all persons aggrieved by any order or decree.” This supplement, being constitutional (*Harris v. Vanderveer’s Exr.*, 6 C. F. Gr., 424), should receive the same

interpretation as had before been given to its words in the constitution itself. The right of appeal must therefore be sustained.

In assailing the order of the court below, the appellants first insist that the Ordinary allowed larger commissions than are permitted by the statute regulating such matters. This statute is section 110 of the Orphans' Court act (Rev. p. 776), to the effect that :

“On the settlement of the accounts of executors, administrators, guardians or trustees under a will, their commissions, over and above their actual expenses, shall not exceed the following rates: on all sums that come into their hands, not exceeding one thousand dollars, seven per centum; if over one thousand dollars and not exceeding five thousand dollars, four per centum on such excess; if over five thousand dollars and not exceeding ten thousand dollars, three per centum on such excess; and if over ten thousand dollars, two per centum on such excess; provided, that the commissions of executors and administrators in any estate where the receipts exceed the sum of fifty thousand dollars shall be determined by the Orphans' Court on the final settlement of their accounts according to the actual services rendered, not exceeding five per centum on all sums which come into their hands.”

The allowance to these executors being three per centum on \$517,533 01, must find its warrant in the proviso just recited, and the appellants insist that the settlement of accounts upon which this allowance was made was not a final settlement within the meaning of that proviso. This claim is based upon the fact that there appears to be a power to sell lands vested in the executors and not yet executed, and also a suit pending in a foreign State on behalf of the testator, to the proceeds of which (if any) the executors will be entitled, and, therefore, further accounts will hereafter be required, and so the present cannot be called a *final* settlement.

The apparent reason for emphasizing this word “final,” which is suggested by the collocation of the phrases “settlement of accounts” and “final settlement of accounts” in

the same section, vanishes when we notice that this proviso was at first enacted as a separate law (P. L. of 1867, p. 979), and obtained its present place only in the Revision of 1874. Such change of position does not alter its significance. (*State v. Kingsland*, 3 Zab. 85; *In re Thomas Murphy*, 3 Zab. 180; *Ruckman v. Ransom*, 6 Vr. 565; *Marts v. Cumberland Ins. Co.* 15 Vr. 478.) The expression "final settlement of accounts" did not originate with this proviso, but occurs in section 108 of the Orphans' Court act, which has existed ever since 1784. (Pat. 59, § 17; Elmer's Dig. 360, § 32.) In this section it is plainly applied to a settlement after which further moneys may come to hand for administration, and, therefore, it cannot be regarded as necessarily equivalent to "the settlement of final accounts." Its correct meaning is indicated in *Stevenson's Admr. v. Phillips' Exr.* 1 Zab. 70. When an executor or administrator presents his accounts, purporting to charge himself with everything that he has received, and to credit himself with everything that he has disbursed, and to show the balance on hand for distribution among the legatees or next of kin, and the court, after due notice to parties interested, makes decree approving and allowing such accounts, that is a final settlement of the accounts, even though it appear that there is still outlying property of the decedent which may yet come into the accountant's possession for administration. As to the subject-matter on which it operates, the settlement is final. (*State v. Hanford*, 6 Hal. 71, 73; *Black v. Whitall*, 1 Stock. 572, 585.) Such is the character of the present account and decree, and the case comes within the proviso mentioned.

The appellants next insist that the commissions are excessive, because allowed on too large an aggregate and at too high a rate.

Included in the aggregate of the estate are five hundred shares of stock, which had been bought by the testator through a firm of brokers wherein his son, one of the executors, was a partner, and which were held by that firm to secure \$38,795 71, advanced by it towards the purchase. The stock was sold, after the testator's death, by order of his executors, for \$50,550, and this sum is placed in the account. The appellants claim

that on only the amount actually realized by the estate, after the payment of the brokers' advances, about \$11,000, should commissions be allowed. But we think otherwise. The stock really belonged to the testator, and the claim of the brokers was his personal indebtedness, and it became part of the executors' duty to determine how they would dispose of that property, and how they would pay that debt. The responsibility of due administration was cast upon them and they met it. If they did not take manual possession of the stock (and perhaps they did even that, since one of them was a member of the brokers' firm), they assumed actual control of it, making the brokers their mere agents. Through these agents they sold it, and the proceeds, coming into the hands of their agents, came, in law, into their own hands. This satisfies the statute.

Another large part of the estate consisted of securities which the executors received and inventoried at their market value, and afterwards transferred to the legatees as so much cash. These are properly included in the aggregate. The statute was not designed to limit commissions to the mere money received. (*Cairns v. Chaubert*, 9 Paige, 160.) So to interpret it would often constrain these officers to do what would be for the disadvantage of those whose interests were intrusted to them, to convert into cash what could easily be divided and might better be preserved *in specie*, or else abandon all right to compensation for service rendered and risk incurred. Such interpretation would also be opposed to the uniform practice of our Probate Courts. We think commissions may be allowed upon any personal property that comes to hand having a money value. Its reception gives the right to some compensation; how much, depends on other circumstances which the statute submits to judicial discretion.

A third item in the aggregate is the par value of three hundred and thirty shares of stock in the Third National Bank of St. Louis. This never came under the executors' control. It passed into the hands of an administrator *cum testamento annexo*, appointed in Missouri, and was by him transferred directly to the legatees. This item should be struck out.

The aggregate is thus reduced to \$484,233 01. We think

three per centum on this sum, \$14,527, exceeds proper compensation. The statute requires the allowance to be made "according to the actual services rendered," and with reference to the actual pains, trouble and risk incurred in settling the estate, rather than in respect to the *quantum* of estate. In the present case the estate was almost entirely made up of securities readily salable in the New York market, which were either sold there by the firm of brokers already mentioned, at the usual commission, or transferred by the executors to the legatees *in specie*. The indebtedness of the testator was very slight, no litigation attended the administration, and the executors were prepared to settle their accounts in about a year after the probate of the will. Seldom could an estate of such magnitude be administered with so little "pains, trouble and risk" as were needed by this one. On the other hand, it is to be remembered that the provisions of the will have been executed thus far with discretion, fidelity and promptitude, and these qualities form highly valuable elements in the services rendered. One of the executors is a counselor of this State, and while he cannot be allowed counsel fees aside from commissions, yet the fact that his professional skill has made it unnecessary to invoke other legal assistance may justly be regarded. Taking all things into consideration, we think two per centum on the aggregate of \$484,233 01 will be a reasonable compensation to the executors.

It must be understood that this allowance covers only what has already been done, and the distribution of the balance which this amount shows. The statute does not permit us to compel the estate to pay in advance for what may yet be requisite to fully execute the will, and for obvious reasons, which the Ordinary sufficiently indicates in his opinion in this cause, such a course would be unjust.

The orders of the Orphans' Court and the Prerogative Court will therefore be reversed, and the record remitted for the entry of a decree in accordance with this opinion.

Decree unanimously reversed.

HANDY vs. COLLINS.

[60 Maryland, 229.]

**EXECUTOR'S RIGHT TO COMMISSIONS ON DEBT OF TESTATOR
BEQUEATHED HIM.**

An executrix is entitled to the interest attached by the will to a legacy given her although she had cash in hand sufficient at testator's death to pay the same. An executrix is not entitled to commissions on a debt due testator and specifically bequeathed her by him.

APPEAL from the Orphans' Court of Baltimore.
The opinion states the case.

Wm. S. Bryan, for appellant.

F. W. Brune, and *Stewart Brown*, for appellee.

MILLER, J. William H. Collins died on the 1st of June, 1881, leaving a will by which he appointed his widow, Frances C. Collins, his sole executrix. His personal estate, according to the inventory, amounted to a little over \$181,000, and consisted mainly of Baltimore City Stock. Besides this he held two bonds or single bills executed to him by B. Johnson Barbour, of Virginia, the brother of his wife, one for \$20,000, and the other for \$6,000. These were the only debts due to him, and the debts he owed were few and of small amount. By his will he gave and bequeathed to his wife the two "bonds or single bills" of Barbour, sundry legacies of stock, furniture and money, and also his dwelling-house and lot on North Calvert street. Then, after giving a number of pecuniary legacies to other persons, he devised and bequeathed all the rest and residue of his estate to four named parties, his cousins, of whom the appellant is one. He left no children or descendants of children surviving him. The executrix accepted the trust, gave bond, and on the 15th of February, 1882, she propounded to the Orphans' Court her first administration account. To the passage of that account the appellant interposed a number of exceptions, and

from the order of the court overruling some of these exceptions and sustaining others this appeal is taken. It becomes then our duty to consider such parts of the order as are adverse to the appellant, or of which he complains.

The court by its order allowed the executrix commissions at the rate of seven and a half per cent., and to this objection is made. The law declares that commissions to executors and administrators shall be at the discretion of the Orphans' Court, not under *five* and not exceeding *ten* per cent. (Code, art. 93, sec. 5), and it is clearly settled that the rate fixed by that court in the exercise of this discretion, within the prescribed limits, is not a subject of review on appeal. (*Wilson v. Wilson*, 3 G. & J. 20.) While this general proposition is conceded, the appellant's counsel nevertheless contends that under the provisions of this will the Orphans' Court could not irrevocably fix the rate of commissions. In the clause of the will appointing the executrix, the testator "*asks*" the Orphans' Court to accept such security on her bond as she may be able to furnish, as he is satisfied she will faithfully settle up his estate, and in this connection, adds "and I intend she shall be allowed as my executrix *reasonable commissions*." The argument then is to this effect:—"The testator, if he had so chosen, had the right, in view of the provision he had already made for her in his will, to determine that his executrix should receive no commissions whatever (Code, art. 93, sec. 6); and as he could thus take away all, he could as a necessary consequence, take away any part, or limit the commissions as he pleased. Now he says he intends she shall be allowed reasonable commissions. He knew if he said nothing that the Orphans' Court could allow commissions in their discretion. He therefore did not mean to leave the matter to the discretion of that court. He meant that she should have a reasonable compensation for the *services*, to be determined, not by discretion, but by the *facts* of the case, as shown in evidence; and that this *quantum meruit* is to be ascertained by the court in the ordinary way upon testimony taken before it, and its judgment thereon is the subject of appeal and review as well as is its finding upon any other question of fact." But the answer to this argument is obvious. The

section of the Code referred to (art. 93, § 6) declares that: "If anything be bequeathed to an executor by way of compensation, no allowance of commissions shall be made unless the said compensation shall appear to the court to be insufficient; and if so, it shall be reckoned in the commission to be allowed by the court." To bring a case within the operation of this section the bequest in the will must be expressly made to the executor, in lieu, or by way, of compensation for his services as executor, and even then the discretionary power is still left to the court of allowing more, unless indeed the bequest should be in excess of the *maximum* limit of ten per cent. No such bequest is to be found in the will before us. On the contrary the testator expressly declares that he intends the provision made for his wife, which he believed would "about fairly represent the one-half part of my net estate, shall be in full of her claim as my *widow* in and to my estate, real, personal and mixed." And apart from the provisions of this section of the Code, it has been explicitly decided that a testator cannot by anything put in his will in any wise affect the commissions which the law allows his executor. He cannot deprive the executor of such commissions, nor cut them down, nor take away the discretion vested in the Orphans' Court. (*McKim v. Duncan*, 4 Gill, 72; *State, use of Manning v. Baker*, 8 Md. 49.) In fact, where there has been a full administration, even the court has no power to deprive him of the *minimum* amount which the law gives him; for, as was said in the case last cited, "the law commands an allowance to a certain amount, and it is not within the power of either court or testator to defeat it." Nor has the doctrine of election any application here. The general rule that a man shall not take a benefit under a will, and at the same time defeat the provisions of the instrument, finds its application in cases where the will devises property of the testator to him, and at the same time devises his own property to another. (*Barbour v. Mitchell*, 41 Md. 151.) And, as was said in *McKim v. Duncan* (4 Gill, 85), "a person by undertaking the office of executor does not *elect*, and is not bound to give effect to all the provisions to be found in the will. Such clauses as are inconsistent with the law, which the executor is to obey, are of

no validity and constitute *no part* of the will." But again, the views we have thus expressed, proceed upon the assumption that it was the design of the testator, in declaring that he intended his executrix should be allowed reasonable commissions, to take from the Orphans' Court the discretion which the law gives them over this subject. This expression, however, in the connection in which it is used, is fairly susceptible of the construction that it was simply a suggestion to the judges of that court, or the expression of a desire on his part, that in the exercise of their discretion they should give her a reasonable as distinguished from an extravagant or a meagre allowance. But in any view that can be taken of the case it is plain that this part of the order appealed from is not open for review by this court.

Exception is taken to an allowance in the account of \$33 paid for rent of a pew in Grace Church. The pew itself the testator devised to his wife, the executrix. With respect to this claim we have nothing but the bill for the pew rent. That bill is made out against Mr. Collins, and upon its face is for six months rent of the pew "in advance to Dec. 1st, 1881." This, in the absence of other proof, authorizes us to assume that the testator rented the pew under a contract by which the rent was payable in advance according to the terms of the bill. This being so, it is plain that in computing the time the first day of December must be excluded. Then counting the six months *back* from that day, the bill became due and demandable on the thirty-first day of May, and as the testator did not die until eleven o'clock on the night of the first of June, it is clear this was a debt due by him in his lifetime, which the executrix was justified in paying out of the assets in her hands. We therefore find no error in that part of the order which overrules this exception.

One Johnson, a colored man, was a tenant of a portion of the *leasehold* estate of the deceased, and exception was taken to the account because the executrix has not charged herself with the rent due from this tenant. The court below sustained this exception and directed the executrix to charge herself with the rent actually received by her as executrix. The objection

now made is that the order should have required her to charge herself with all the rent *due* from Johnson, instead of all that she had actually *received* from him, he being shown to be amply able to pay the same, and being, in fact, a legatee under the will to the extent of \$1,000. It is quite enough to say in answer to this objection (even if otherwise there were anything in it) that there is no proof in the record that the executrix had not *received* all the rent that was actually *due* by this tenant at the time the account was propounded.

The deceased in his life used a room in his house on St Paul street for an office. This was also leasehold property, and forms part of the residue of his estate given to his residuary legatee, and exception is taken to the account because the executrix had not charged herself with the rent of the office room. The proof shows that it remained unoccupied after the death of the testator. The executrix in her testimony says she put the office in condition so that it could be rented at any moment, but she had no application for it. We are clearly of opinion she cannot be held liable for the estimated rental value of this room from the death of her husband to the date of this account, simply because she did not advertise it, or employ an agent to rent it. The court below was right in overruling this exception.

Among the provisions for his wife the testator gave her a legacy of \$6,000 in money, "with interest from his death till paid." The same provision as to interest is attached to all the other pecuniary legacies in the will, and the principal sums so given amounted to nearly \$14,000. In her account the executrix claims a credit for this sum of \$6,000, and also \$255 for interest thereon from the first of June, 1881, to the 15th of February, 1882, in other words, from the death of testator to the time of payment. Exception is taken to the allowance of this sum for *interest* upon the ground that the testator at the time of his death had over \$7,000 in bank, which, it is insisted, it was the duty of the executrix long ago to have applied in discharge of her legacy so as to save to the estate for the benefit of the residuary legatees the interest thereon. It was, however, no more her duty to appropriate the money in bank to the pay.

ment of her legacy than to apply it to the payment of the other pecuniary legacies, and she was clearly under no legal obligation to pay any of them even at the time she did. This account was rendered within less than twelve months after the date of her letters. The law allows to every administrator and executor the period of twelve months from the date of his letters before he can be required to render his first administration account. (Code, art. 93, sec. 1.) Payment of these legacies could not have been enforced at the date of this account, and the executrix had, therefore, committed no default of which the law can take notice, in not paying them before, and in paying interest upon them she simply obeyed the express mandate of the will. The court committed no error in overruling this exception.

The account also claims a credit of \$100 for "cash retained for bill for paving Calvert street," and to this exception is taken. It appears that on the 27th of April, 1881, an ordinance was passed for the repaving of part of Calvert street. This ordinance provides that one-third of the cost of the work shall be paid by the city, and the other two-thirds "to be assessed as provided by ordinance No. 44 of 1874, upon the owners of property binding on the portion of the said street thus directed to be repaved, in proportion to the front feet owned by them respectively." The ordinance of 1874 thus referred to requires all contracts for such work to be awarded to the lowest bidder, and then provides that *after* a contract has been thus awarded in any given case, the city commissioner shall assess and lay a tax for the expense of the work upon the owners of property fronting upon each side of the street, and this tax is made a lien upon such property. It is also further provided that, *after* the contract has been awarded, the "city commissioner shall make a correct list of the names of the persons liable to pay the tax for the same, and the amount to be paid by each person," and he is then required to deliver to the city collector a duplicate list of such persons "with directions for collecting the said tax, which shall be due in sixty days after the completion of the work and its acceptance by the city commissioner." In the present case, the paving contract was signed on the 27th of

May, 1881, a few days before the death of the testator, whose dwelling-house and lot fronted on this part of Calvert street, and the work appears to have been actually done under that contract. As already stated, the testator owned this property in fee, and by his will devised it to his wife. The question then is, did he, in his lifetime, become liable to pay the cost of the paving in front of this property, and this, it must be admitted, is a question not free from difficulty. In view of the almost constant change of ownership of property in a city like Baltimore, it would be impossible to carry out such ordinances as these unless some period in the course of the proceedings be fixed upon, after which change of ownership can have no effect. Such a date must be determined, and looking to the various provisions of these ordinances and the difficulty, in this respect, attending their execution, we think a reasonable construction requires that ownership at the date of the contract under which the work is afterward actually done, should fix the personal liability for the tax, for it is by that contract that the liability to pay for the work is incurred. In our opinion, then, the persons who are owners at that time are the persons liable for the tax, and this, in the present case, would fasten the liability upon the testator. It follows that the executrix had the right to retain the money to meet this paving bill.

Exception is also taken to the account because the executrix thereby claims commission upon \$26,000, the amount of the bonds of Barbour, which were specifically bequeathed to her by the will, and that raises the most important question in the case. This debt formed no part of the inventory, was never appraised, and indeed was not the subject of appraisement. It was returned as a "separate" debt, and at the hearing of these exceptions it was shown that the debtor had, in 1878, executed a deed of trust conveying to a trustee certain real and personal property in Orange county, Virginia, to secure its payment. Proof was also offered tending to show that this property was sufficient to pay the debt. It was not necessary to collect it in order to pay creditors, and no part of the money was ever paid to her by the debtor, or ever came into her hands as executrix, nor was a cent of it ever for a moment under the protection of

her bond. She never incurred any liability whatever on account of it, and, in fact, she could not have sued the debtor in Virginia to recover it by virtue of letters testamentary granted in this State. In the account she charges herself on one side with the amount of this debt, and on the other takes credit for it as specific legatee thereof. For the simple acts of returning it as a "separate" debt, and placing the sum of \$26,000 on both sides of her administration account, she claimed and was allowed commissions to the amount of nearly \$2,000, which to that extent diminishes the residue of the estate. This is so unreasonable, and so unjust to the residuary legatees, that it ought not to be allowed unless the law by special mandate or just construction requires or permits it to be done. But the testamentary law of the State will be searched in vain for any provision which commands or justifies such an allowance. To make this plain, a brief review of the several provisions of the testamentary law bearing upon the subject is necessary.

The only mention made of commissions is in section 5 (Code, art. 93), and it is there declared they shall be allowed "on the *amount of the inventory or inventories*, excluding what is lost or perished." Of what the inventory shall consist and how it shall be made and returned are the subjects of minute and special directions. It is made the first duty of an administrator or executor, after obtaining his letters, to see that an inventory is taken "in order that all persons interested in the personal estate may have an opportunity of knowing, as nearly as may be, the amount of the same." (Sec. 204.) For the purpose of making such inventory two discreet and disinterested appraisers must be appointed by the court "to appraise the goods, chattels and personal estate of the deceased known to them or to be shown by the executor or administrator." (Sec. 205.) These appraisers must act under oath, and in discharge of their duty must "set down each article with the value thereof in dollars and cents." (Secs. 208, 209.) This constitutes the inventory which the administrator is required to return within three months from the date of his letters. (Sec. 210.) In such an inventory debts due the deceased are not included, and in sec. 220, which defines what "shall be

deemed and taken for assets in the hands of an administrator," they are not mentioned. On the contrary his duty and liability with respect to debts are prescribed in subsequent sections. By sec. 221, he is required to return "a list of the debts due to the deceased which have come to his knowledge, specifying the nature of each debt, and setting down such as he shall deem sperate, distinct and separate from those which he shall deem desperate or doubtful." By sec. 222, it is declared he shall not be answerable at all events for a debt which he shall return sperate, and that such return is required "merely to enable the court and all parties concerned to form a just estimate of the circumstances of the deceased." By sec. 223, it is made his duty to bring suit for every debt which the court shall not mark in the list as desperate, or improper to be put in suit, unless the debt be paid within six months after such marking, "or unless the debtor be out of the State," or unless he shall show a reasonable excuse within one month after the lapse of the six months, and for a failure to bring such suit his bond is made liable, not for the amount of the debt, but for "such damages as shall be found by the jury" in a suit thereon. By sec. 224, it is provided that if a debt be due the deceased by the *executor*, it shall be his duty "to give in such claim in the list of debts," and if he fails to do so a mode is provided for ascertaining the amount due, "and if the executor shall give in such claim, or any part thereof be established as aforesaid, he shall account for the sum due in the same manner as if it were so much money in his hands, and on failure his bond may be put in suit." This makes a clear distinction as to his responsibility between a debt due by himself, and a debt due by a third party. But this makes it more plain that debts form no part of the inventory, and that an administrator cannot charge himself with the face amount of such debts in order to swell his commissions, it is provided in sec. 4 that in his first account, which must be rendered within twelve months from the date of his letters (sec. 1), he shall charge himself with the assets which have come to his hands according to the inventory or inventories returned to the court, and that "*all moneys received for debts due the decedent shall be included in*

said account. Such are the provisions and requirements of the law. Now how have they been construed by the courts?

The case of *McKim v. Duncan*, 4 Gill, 72, has been strongly relied on as sustaining this allowance of commissions. In that case the testator by his will bequeathed to his son David (who was one of his executors), and to his sons John and Richard, to be equally divided between them, the whole of his capital used in the copper business that may be standing to his credit, "after payment of all debts and claims upon or growing out of that business," and by his codicil he revoked the devises and bequests in favor of David, and gave the same to him in trust for his wife. From an examination of the record in that case it appears the testator was a partner with his sons in the business referred to, and in the list of debts returned by the executors this capital is stated as a debt thus: "David T. McKim and John S. McKim, surviving partners of John McKim & Sons, for amount of capital of late John McKim, Jr." (the testator) "in Copper Co., subject to bad debts and collections, \$99,025 85." In their first account the executors charge themselves with this sum, "being the amount of the decedent's interest in the firm of John McKim, Jr., & Sons, as returned in the list of debts due to the deceased," but in their second account they take credit therefor upon the ground that the firm was not yet settled up and the actual amount due to the deceased for his interest in said firm is *not yet received*." In their third account, rendered some time thereafter, the same amount is restored, and the executors again charge themselves with it. There is enough in the record to show, or to warrant the inference, that between the date of the first and third accounts David T. McKim, who was one of the surviving partners, as well as one of the executors, settled up the business of the firm, ascertained the amount due his testator, and actually received it, or had it under his control; and it is beyond dispute that he paid it over to the legatees respectively and took their several releases therefor. In allowing the executors commissions on this sum the Court of Appeals evidently considered it as a debt actually collected and received by one of them, and paid over by both to the legatees named in the will and codicil. This is manifest

from what is said upon the subject in the court's opinion. "The *money*," say the court, "was unquestionably a part of his personal estate, and *when paid to them* (the executors) constituted a part of the assets in their hands to be by them accounted for in their settlements with the Orphans' Court; the testator could not by his will prevent the executors from *collecting* and accounting for this portion of his estate, or authorize any other person to receive it from the debtors." The most that can be made of this decision is that it authorizes the allowance of commissions on *money* actually collected and received by an executor on account of debts due the testator and which he disburses in payment either of the claims of creditors or legatees. Viewed in this light the decision does no violence to the provisions of the testamentary law referred to, but places a reasonable construction upon them; for if an executor receives or collects money on such debts his bond immediately becomes responsible for its safe custody and due application as directed by the law or the will, and it is reasonable he should be allowed for such services and liability. But in the present case the facts are very different. There is here no pretence or ground for assuming that the executrix had ever received or collected any money whatever on account of this Barbour debt.

The case of *McPherson v. Israel*, 5 G. & J. 60, is also relied on by counsel for the executrix. In that case the question immediately before the court was, what commissions should be allowed an administrator who had died before completing his administration, but in the court's opinion the remark is made that "the inventory of the deceased's estate, and in an enlarged construction of this, all the assets *accounted for* by the administrator is the true standard by which to ascertain the commissions." But by this the court surely did not mean to say that an administrator can charge himself in his accounts with debts returned in the list of debts, and receive commissions on the amount appearing due on their face. It is hardly possible to conceive that the court intended so to construe the law, or to lay down the doctrine that debts thus treated were "assets accounted for by the administrator," so as to become the basis for an allowance of commissions, whether they were ever actually

collected or not. If that were so the doctrine would apply to doubtful and desperate as well as to sperate debts, and by this process of administration many solvent estates would be made bankrupt to the great prejudice of creditors as well as of legatees or distributees. It is evident no such construction can be placed upon this expression of the court in that case.

In the more recent case of *Stratton's Estate*, 46 Md. 551, the appraisers returned thirteen railroad bonds for \$1,000 each "at their face value, we having no means of ascertaining their market value." They were embraced in the inventory, and the administrators, in their first account, charged themselves with the bonds, and claimed and were allowed commissions thereon at their face or par value. A second account was also passed in which this allowance was recognized; but afterwards, upon objection made by a party interested in the distribution of the estate, this court held that it was manifest error to allow commissions on those bonds at their par value; that they had not in fact been appraised, and could not, as they stood in the inventory, be considered as forming such part of it as required the court to allow a commission upon them under the 5th section of art. 93 of the Code; and that the Orphans' Court was right in directing another warrant to issue for their appraisal, and reserving the right of adjusting, upon the passage of their final account, the amount of commissions to be allowed the administrators upon them. In this case the inventory itself was looked into for the purpose of detecting and eliminating from the administration account an unauthorized allowance of commissions. And it is a very strong authority to show how far the court is inclined to go in keeping commissions strictly within a proper construction of the law. It shows that an administrator cannot, simply by charges against himself in his accounts, obtain commissions which the statute does not allow.

It seems, then, that the allowance to the executrix of commissions on the face amount of these Barbour bonds is not authorized by any provision of the testamentary law, as construed by the decisions of this court. If the exigencies of the estate had required their collection in order to pay creditors, or general pecuniary legacies, it would have been her duty to have brought

suit upon them, if the debtor had resided in this State, and her bond would have been responsible for the faithful performance of that duty, as well as for the safe keeping and proper disbursement of the money collected. In that case she would have been entitled to commissions, but only upon the amount actually collected and received by her, though that amount might have been but a small part of the sum due by the debtor. Where there is a specific legacy of a personal chattel the case is different. The chattel has a market value, is the subject of appraisement, is required to be appraised, and properly forms part of the inventory of the estate, upon the amount of which the law expressly declares commissions shall be allowed. Moreover, the executor's bond is responsible for the safe custody of the chattel until he gives his assent to the legacy and passes it over to the legatee. Bonds and obligations of the United States, and of the several States, as well as of corporations, municipal or private, which are payable to bearer, and pass by delivery, and have a market value, are also properly appraised and go into the inventory. The same thing may be said of shares of stock in banks and other corporations, but a bond or note for the payment of money, given by an individual to the testator, is simply a *debt*, in respect to which the duties of the executor, as already shown, are specially defined by distinct provision of the testamentary law. Such debt has no market value, is not the subject of appraisement, and constitutes no part of the inventory. But upon money received by the executor, or collected by him from such debts, he is entitled to commissions, as was decided in the case of *McKim v. Duncan*. Money thus received or collected is placed on the same footing, with respect to commissions, as money in bank or in the possession of the deceased at the time of his death, or as money received by an administrator for land sold by the decedent and conveyed by the administrator after his death, which he is required to return as a separate debt due the estate of the decedent. (Code, art. 93, sec. 226.) As was said in the case of *McPherson v. Israel*, an enlarged construction of the term "inventory" properly includes such money as "assets accounted for by the administrator." But where there is a specific bequest of such in-

dividual bond or note, the sole duty of an executor in regard to it, where the money due upon it is not needed for other exigencies of the estate, is to give his assent to the legacy and deliver the instrument to the legatee. By such assent and delivery the legatee is vested with the right to sue upon the obligation in his own name. A bequest by the obligee, of a single bill, is an inchoate transfer of the bill in writing by the person authorized to make it, and when that transfer is perfected by the assent of the executor, there is a complete assignment of the same under sec. 1, art. 9, of the Code. (*Kent v. Somerville*, 7 G. & J. 265.) Here there was not only a specific bequest of such bonds, but it was made to the executrix herself. There is nothing in the law, nor in any decision construing it, which justifies the allowance to her of commissions on the amount represented by these bonds, and it follows there was error in that part of the court's order which overrules the first exception to the account. In other respects the order will be affirmed. The account must be corrected by striking out the commissions on the \$26,000. Each party will be required to pay his own costs, both in this court and in the Orphans' Court, and the remanding order will so provide.

Order affirmed in part, and reversed in part, and cause remanded.

STONE and RITCHIE, JJ., dissented.

Compensation of executors.—The long established rule of English chancery that a fiduciary office is honorary and gratuitous is not followed in the United States. *Perry on Trusts*, §§ 482, 904; *Robinson v. Petts*, 3 P. Wms. 132; *Barney v. Saunders*, 16 How. (U. S.) 542; *Clark v. Platt*, 30 Conn. 282.

The regular compensation of executors and trustees in the United States is regulated in each State by statute. These statutes, as at present in force, are well digested in *Perry on Trusts*, § 918.

Where the will granted to one of two executors and to the wife of the other, one-half of the residuary estate, and directed that they should receive no compensation, or fees, it was held that no compensation could be allowed by the court. *Secor v. Sentis*, 5 Redf. 570.

Allowance for compensation to an accountant employed by the admin-

istrator, in keeping and making up accounts, is held improper. *Re Wolfe*, 34 N. J. Eq. 223; *Miles v. Peabody*, 64 Ga. 729.

An executor, being an attorney, cannot charge his counsel fees, when he himself prepared the accounts. *Re Valentine*, 9 Abb. N. C. 313; *Hough v. Harvey*, 71 Illinois, 72; *Mayer v. Galluchat*, 6 Rich. Eq. 2.

When an executor performs services as an attorney or agent for the estate, or when he makes investments for the benefit of the heirs, or acts as their attorney in court, or their agent in completing the building of houses, he cannot charge the estate therefor, with any amount over and above his regular commissions. He may employ an agent or an attorney, if necessary, but if he acts as such himself he cannot charge for his services. *Gamble v. Gibson*, 59 Mo. 585.

But, in Tennessee, where the will propounded by the executor named therein is contested, and finally set aside, he may, where he acted as attorney in the matter, be allowed a counsel fee out of the estate. *Bowden v. Higgs*, 9 Lea (Tenn.), 348.

An administrator, in addition to his legal fees, is entitled, in Missouri, to a reasonable compensation for services performed for the real estate, or for leasing the property, for legal service, advice, etc., and for collecting and preserving the estate, *pendente lite*, where the will is contested, or litigation arises over the settlement of the estate. *Hawkins v. Cunningham*, 67 Mo. 415.

Where an executor superintended and cared for land valued at \$100,000 for fifteen years, which under the provisions of the will was to have been sold at the expiration of that time and the proceeds divided between certain children, it was held that, inasmuch as the children concluded to take the land itself, as it was rising in value, rather than have it sold, the executor, although he was not entitled to a commission, the land not having been sold, yet was entitled to compensation for what he had done for the benefit of the property. *Twaddell's Appeal*, 81 Penn. St. 221.

Where the will creates a trust, and the duties of executor and trustee are united in the same person, double commissions will be allowed. *Ward v. Ford*, 4 Redf. 34.

A contrary doctrine is held in Pennsylvania. *Barclay's Estate*, 11 Phila. 123.

But where the executors, though not appointed trustees under the will, nevertheless act in that capacity, a claim for commission for such services will be disallowed. *Hepburn's Estate*, 11 Phila. 80; *Hall v. Hall*, 78 N. Y. 535.

An executor authorized to sell real estate and pay the proceeds to trustees should not be paid therefor in advance. *Pomeroy v. Mills*, 35 N. J. Eq. 442.

But funds may be retained to pay for such services when performed. *Wheelwright v. Wheelwright*, 2 Redf. 501.

An administrator who does not deduct his commissions until the final settlement, is entitled to compute his per cent. of commission on the aggregate receipts and disbursements, including the accrued interest thereon. *Drake v. Drake*, 82 N. C. 448.

But upon a final settlement a personal representative cannot claim the allowance of a gross sum for his services, but must specify his charges and prove the claim like any other claim against the estate. *Wright's Adm'r v. Wilkerson*, 41 Ala. 267.

In Maine and New Hampshire the courts seem to regard with some favor a *per diem* compensation for time, travel and labor, in addition, in some cases, to the statutory fee, as in *Wendell v. Wendell*, 19 N. H. 210.

But in Illinois a contrary doctrine is announced. *Askew v. Hudgens*, 99 Ill. 468.

Where one has been appointed executor or administrator with a distinct understanding that he is to serve without compensation, he must abide by his engagement. *Bate v. Bate*, 11 Bush, 639.

And where the will fixes the compensation of the executor, and he qualifies and executes the will, he is limited to the amount fixed. *Brown v. Brown*, 6 Bush, 652.

ÆTNA INSURANCE CO. vs. SWAYZE.

[30 Kansas, 118.]

POWER OF ADMINISTRATOR TO COMPROMISE CLAIM.

An administrator has no power to compromise any debt or demand accruing in deceased's lifetime, without the consent of the Probate Court.

The opinion states the case.

M. T. Campbell, for plaintiff in error.

J. H. Moss and *A. L. Williams*, for defendant in error.

HORTON, C. J. The substantial facts in this case are: J. Clarke Swayze insured his life in the Ætna Life Insurance Company for the benefit of his estate, in the sum of \$1,000. He made all the payments required of him in his lifetime, and

in all respects complied on his part with the terms and conditions of the policy of insurance, and this contract was in full force at the time of his decease. After his death, Jennie M. Swayze was appointed and qualified as the administratrix of his estate. The estate is indebted to several persons in a sum exceeding \$2,000, unpaid, and the heirs and next of kin of the decedent are Jennie M. Swayze the widow, and also Oscar K. Swayze, Horace G. Swayze, and J. Clarke Swayze, minor sons of the deceased. After the death of the intestate, his administratrix made proof of that fact as required by the insurance policy, and made demand of the payment due thereon. Subsequently, and on or about the 8th day of September, 1877, the insurance company, by its authorized agent, one J. C. Webster, came to the administratrix in person, and represented to her that the insurance company did not intend to and would not pay the sum of \$1,000 on the insurance policy belonging to the estate of the intestate; that the insurance was void, and nothing could be collected thereon; that the company was possessed of large funds to contest the insurance in the court, and in case an action was brought against the company on the policy, the company had determined to and would expend more than the amount thereof to hinder, delay and defeat the collection of the insurance. These and other representations of like kind greatly alarmed and intimidated the administratrix, and when the agent of the company offered her the sum of \$600 in full payment and compromise of the sum of \$1,000 due upon the policy, being alarmed and troubled by the threats and statements of the insurance agent, she agreed to take the \$600 tendered, and thereupon delivered over to the insurance agent the policy. On the 14th day of December, 1877, the administratrix applied to the Probate Court of Shawnee county to confirm and ratify her acts in compromising with the insurance company, and after a hearing thereon, the court refused to ratify and confirm the compromise, and instead thereof, ordered the administratrix to collect from the company the sum of \$400, being the balance due on the policy. On January 11, 1878, the administratrix brought this action in accordance with the direction of the Probate Court, to re-

cover the \$400. The insurance company demurred to the petition, alleging that no cause of action was set forth therein. The trial court overruled the demurrer, stating as a reason therefor that the administratrix had no authority to compromise the claim specified in the petition, belonging to the estate of J. Clarke Swayze, deceased, without the consent of the Probate Court of Shawnee county. The insurance company stood by its demurrer, and the court heard the evidence sustaining the allegations in the petition. It treated the \$600 accepted by the administratrix as part payment, and gave judgment for the remainder, the said sum of \$400.

Upon the part of the insurance company it is contended that the administratrix had full power to compromise the claim, and that her settlement with the company for \$600 was conclusive and binding upon the estate of which she was the legal representative. In support of this proposition, it is said that our statute does not restrict the common-law powers of administrators to compromise debts, but only provides a way by which they may do so with greater safety to themselves by securing the approval of the Probate Court; that the object of the statute is not to confer upon administrators powers which otherwise they would not possess, but to afford them additional protection when acting in good faith in the exercise of their common-law powers. (*Choteau v. Suydam*, 21 N. Y. 179; *Chadbourn v. Chadbourn*, 9 Allen, 173; *Chase v. Bradley*, 26 Me. 531.)

On the part of the administratrix, it is urged that administrators in this State have no common-law authority to allow, classify, arbitrate, compromise, or pay claims; that it was the intention of the legislature, by the adoption of the provisions in the "act respecting executors and administrators and the settlement of the estates of deceased persons," approved February 28, 1868, to confer upon administrators full and ample power, under the control and direction of the Probate Court, to settle estates of decedents; that the statute is ample to meet all emergencies, and that administrators had no power in these respects excepting that conferred by the statute; that as § 63, chapter 37 of said act, provides a method for compromising

claims, debts or demands belonging to the estate of an intestate and accruing in the lifetime of such intestate, no authority is given administrators to do anything in the way of compromising such claims, debts or demands without the order or consent of the Probate Court.

Said § 63 reads :

“Upon the proper proof being made by an executor or an administrator to the Probate Court that any claim, debt or demand whatsoever, belonging to the estate in his hands to be administered, and accruing in the lifetime of the deceased, represented by such executor or administrator, cannot be collected : *first*, on account of the doubtful solvency or actual insolvency of the person owning the same ; *second*, on account of such debtor having made a voluntary assignment for the benefit of his creditors under the laws of this State, or having availed himself of any of the bankrupt laws of the United States ; *third*, by reason of some reasonable or equitable defense which such debtor or debtors shall allege and make appear against the same ; *fourth*, on account of the smallness of such claim and difficulty in its collection, either from the remoteness of the residence of the debtor, or the ignorance of the executor or administrator of such residence ; said court may order such claim, debt or demand to be compromised or filed in such court for the benefit of the heirs, devisees or creditors of such deceased person, as will sue for or recover the same, giving the creditors the preference if they or any of them apply for the same before the final settlement of the estate ; and such order of the court shall be a sufficient voucher to such executor or administrator.”

In our opinion, in this State the provisions of the statutes restrict the powers of administrators under the common law, and do not simply afford them additional protection in the exercise of those powers. The interests of creditors and of the heirs of an estate are not benefitted by extending or enlarging the authority of administrators beyond the provisions of the statute. It was held in *Lappin v. Mumford*, 14 Kans. 9, that the provisions of our statutes prescribing the manner and conditions of sale by administrators are to be regarded rather as

restrictions upon this otherwise absolute power, than as original grants of power; that the administrator who, independent of such provisions, could sell when he pleased and upon such terms as suited him, responsible to the creditors and heirs only for reasonable fidelity in his trust, must now proceed in accordance with the regulations of the statute. We said in *Collamore v. Wilder*, 19 Kans. 67, that an administrator is merely the agent or trustee of the estate, acting immediately under the direction of the law prescribing his duties, regulating his conduct and limiting his powers. (See, also, *Hanson v. Toole*, 19 Kans. 282; *Clawson v. McCune*, 20 Kans. 337; *Brown v. Evans*, 15 Kans. 88; *Black v. Dressel's Heirs*, 20 Kans. 153.)

The authorities cited contrariwise are not strictly applicable. In *Chadbourn v. Chadbourn* (*supra*), it was decided that—

“By conferring on courts of probate jurisdiction to authorize executors or administrators to submit demands in favor of or against estates in their hands to arbitration, or to compromise them, the legislature intended only to give security and protection to these officers in the exercise of that authority with which they are clothed by the common law.”

This decision is based solely upon the doctrine that the rule of common law in force in Massachusetts, prior to the adoption of the statute, was not repealed thereby, as it was not clearly apparent that the legislature intended to abrogate the common law in adopting the statute relating to the arbitration and compromise of demands in favor of or against estates. We judge that *Chouteau v. Suydam* (*supra*), and *Chase v. Bradley* (*supra*), and similar decisions in other States, were decided upon like reasons. In this State, the provisions of the common law remain in force in aid of the general statutes of the State, and where a whole subject has been revised by the legislature, the common law is superseded by the statute, unless it is needed to help out or aid the statute. In Massachusetts, when the early settlers “came into this new world, they claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to

their new state and condition. The common law thus claimed was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never re-enacted in that State, but were considered as incorporated into the common law." (*Commonwealth v. Knowlton*, 2 Mass. 534.)

Kansas was annexed to the United States in 1803, as a part of the territory bought from France, under the general designation of Louisiana, and in Louisiana the civil, not the common law, prevailed then and prevails now. The territorial legislature of Kansas enacted the following statute:

"The common law of England, and all statutes and acts of parliament in aid thereof, made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom, and not repugnant to or inconsistent with the Constitution of the United States and the act entitled, 'An act to organize the territories of Nebraska and Kansas,' or any statute law which may, from time to time, be made or passed by this or any subsequent legislative assembly of the territory of Kansas, shall be the rule of action and decision in this territory, any law, custom or usage to the contrary notwithstanding."

In the revision of 1868, § 3 of chapter 119 prescribes:

"The common law, as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the general statutes of this State; but the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this State, but all such statutes shall be liberally construed to promote their object."

Therefore, in our opinion, the decisions holding that the statutes empowering the courts of probate to authorize administrators to pay, arbitrate and compromise demands in favor of and against estates, do not repeal by implication or otherwise the settled rule of the common law in force in those States, are not controlling in Kansas. (See *Fox v. Van Norman*, 11 Kans. 214; *Reitzell v. Miller*, 25 Ill. 68; *Clark v. Hogel*, 54

III. 227; *Stagg v. Lennenfiser*, 50 Mo. 341; *Cape Girardeau County v. Harbison*, 58 Mo. 90; *Parham v. Steth*, 56 Miss. 465.)

As under our statute the duties and powers of administrators are so clearly defined and limited that they cannot exercise authority contrary thereto or in excess thereof, and as the administratrix of J. Clarke Swayze, deceased, never presented any application to the Probate Court for authority to compromise the claim of the estate of the decedent against the insurance company, before attempting so to do, and as the Probate Court never consented to or ratified the attempted compromise, but directed the administratrix to proceed to collect all due on the insurance policy, the trial court committed no error in overruling the demurrer to the petition, and in rendering judgment upon the evidence as prayed for.

Upon the other questions presented, we do not think there need be any comment.

The judgment of the District Court will be affirmed.

All the justices concurring.

MAGEE vs. O'NEILL.

[19 South Carolina, 170.]

BEQUEST CONDITIONAL ON BENEFICIARY BEING EDUCATED A
ROMAN CATHOLIC.

A bequest in trust for the maintenance and education of a granddaughter upon condition that she is educated in a Roman Catholic school, and is raised in that faith, with a limitation over, is not void for uncertainty, for impossibility, unconstitutionality, or as against public policy.

ACTION to recover a legacy and for an accounting.

Simonton & Barker, for appellants.

A. G. McGrath, opposed.

McGOWAN, J. John Magee, of Charleston, by a clause of his will, devised as follows: "Item. I bequeath one-twentieth part of the remaining collections and proceeds arising from the debts collected and the sales of all my personal property and real estate to my friends John F. O'Neill and Thomas O'Brien, to them and their heirs, *in trust*, to invest the same in property yielding a certain interest, which said income or interest shall be appropriated to the maintenance and education of my grandchild, Elizabeth Magee, daughter of my deceased son, the late Captain Arthur Magee, until her day of marriage or when she attains the age of twenty-one years, *provided she is educated in some Roman Catholic female seminary or school, and is reared as a Roman Catholic in the communion and faith of her deceased father, the said Arthur Magee*; and on her day of marriage, or attaining the age of twenty-one years, the bequest—the whole amount—shall be paid over to her and her heirs, forever freed from all trusts whatever. But if the said Elizabeth Magee is not educated at a Catholic seminary or school, and reared as a Roman Catholic in the faith of the Roman Catholic Church, then it is my intention, will and direction that the bequest shall accumulate, the interest or income as it arises shall be added to the principal until the said Elizabeth Magee's death or marriage, or attaining the age of twenty-one years, when, on the happening of either of these events, the whole amount—principal and interest—shall be divided and paid over to the trustees of my daughter, Elizabeth West, the wife of Preston West, and Mary Brown, the wife of Isaac Brown," &c., and then specifying the limitations and conditions to which the said property should be subject.

When the said Elizabeth Magee arrived at the age of twenty-one years (she is now the wife of J. E. Harris), she filed the complaint in this case against the trustees named in the will, asking that they should account for the said bequest, with the accumulated interest, and upon that accounting pay over the same to her under the will of her grandfather, John Magee. The trustees of Elizabeth West and her children, and of Mary Brown and her children, were also made parties, and they all answered, claiming that the bequest should be paid to them, for

the reason that the express terms and conditions upon which the legacy had been given to the trustees for the plaintiff had not been complied with—that Elizabeth Magee was not “*educated at a Roman Catholic female seminary or school, and reared as a Roman Catholic in the faith of the Roman Catholic Church,*” as expressly provided by the will.

The cause was referred to Isaac Hayne, Esq., as special referee, to take the testimony and report on the law and facts involved in the case, who took the testimony and reported among other things as follows: “That when the said Elizabeth Magee was about four years old, and while her father was still alive, she was baptized in the Roman Catholic Church, but she had not been ‘educated at a Roman Catholic seminary or school,’ and the evidence does not establish that she was ‘reared in the faith of the Roman Catholic Church.’ That nothing was said or done either by her mother or the said trustees prior to the year 1869 in regard to appropriating the interest and income of the trust estate to the maintenance and education of the said Elizabeth Magee. About that time Mrs. Magee (the widow of Arthur Magee), who was then living with her daughter at Greenville, S. C., applied to the trustees and requested them to assist her from the trust estate in the education of her daughter. Mr. O’Neill referred her to Mr. O’Brien, who stated that the interest and income of the estate was inadequate to maintain and educate Miss Magee at a Roman Catholic institute or school. He proposed, however, that Mrs. Magee should furnish Miss Magee with the necessary clothing and defray her traveling expenses in going to such an institution or school (there being no such school located in Greenville), and that the trustees should then pay her expenses at the institute or school for a limited period, say for about six months. This, he said, was as much as the trustees could undertake to do, in view of the small income which the trust estate yielded,” &c.

And the referee concluded his report as follows: “It would seem, then, that the continuance of the estate, bequeathed to Miss Magee, having been made to depend upon a condition which is, in its nature, too vague and uncertain to be made the subject of judicial investigation, the condition is void for un-

certainly, my conclusion being that it cannot be judicially ascertained whether Miss Magee was or was not 'reared in the faith of the Roman Catholic Church,'; and further, that she cannot be deprived of her legacy, unless the court shall decide that this condition, as well as the condition which required her to be 'educated at a Roman Catholic school,' has or has not been performed. I report, as my conclusion of law, that her estate and interest in the legacy continues as if no such condition had been attached thereto, and that she is entitled to have the trust estate hereinbefore mentioned transferred and paid over to her absolutely."

Exceptions were filed to this report, and the cause came on to be heard by Judge Hudson, who decided that the plaintiff was entitled to the legacy given under the will of John Magee; that she took therein a vested interest, that the condition annexed is a condition subsequent, that the non-performance thereof does not affect her interest, because its subsequent non performance, if it be valid, was owing to no fault of the infant, nor of those having control of the income and of her education, as we have before stated, but chiefly because the condition is void and inoperative as against public policy; and that the legacy, with the accumulation of the interest thereon, be paid over to the plaintiff by the special depositaries with whom it has been placed under and subject to the order of the court.

From this decree the defendants appeal to this court upon the following grounds:

1. "That his Honor was mistaken in his apprehension of the testimony as to the attitude of the trustees to the plaintiff and her mother, and of their reply to her application in 1869; neither of the trustees, in their written reply, having stated that the fund was not sufficient to maintain her at a Roman Catholic school for more than six months.

2. "That the statements of Mrs. Magee bore on their face the evidence of bias, and were wholly insufficient to support or justify any conclusion of fact in the case.

3. "That his Honor erred in holding that 'the testimony of the trustees is very explicit on this point: that the provision made for the grandchild did not admit, in itself, of the per-

formance of the condition, and that, in reply to the letter of the mother, the trustees plainly state that the income was not sufficient to admit that to be done which, it is contended, should have been done, or, if not done, that the legacy should be lost to the plaintiff.' That, on the contrary, the letter of Mr. O'Brien shows that the fund had increased from \$1,500 to \$4,000 in 1869, and says not a word of its insufficiency.

4. "That his Honor erred in holding that 'compliance with the conditions was impossible, because the provision made for it was wholly inadequate,' and that the testator himself made the conditions of the will impossible of performance.

5. "That his Honor erred in holding that the plaintiff took in the legacy under the will a vested interest, and that, as a consequence, the conditions attached were, in their nature, subsequent and not precedent.

6. "That his Honor erred in holding that the conditions of the bequest are void as against public policy.

7. "That his Honor erred in holding that the condition annexed is a condition subsequent, and that the non-performance thereof does not affect her interest because the condition is void and inoperative as against public policy."

The circuit judge held that the referee committed error in deciding as matter of law, that "it could not be judicially ascertained whether Elizabeth Magee, the plaintiff, was not reared in the faith of the Roman Catholic Church;" and in this we concur with the circuit judge. We think the phrase alluded to in the testator's will meant no more than that Elizabeth should be reared within the circle and under the influences of the Roman Catholic Church, in which she had already been baptized, and that was susceptible of proof like any other fact. So that it is clear that the proviso in the will of her grandfather was not carried out, and the only question is one of law, whether, under all the circumstances of the case, the court will adjudge the plaintiff, notwithstanding the condition in the will was not performed, to be entitled to the legacy, or that it goes over to the defendants, her aunts, by way of substitution or limitation.

As the legacy was not given directly to Elizabeth, but to

trustees with directions to pay it over to her "on the day of her marriage or attaining the age of twenty-one years," provided certain conditions were complied with, it is insisted that she had no vested interest in the legacy, but it remained contingent until the time arrived for its payment, and as a consequence that the conditions which were imposed were conditions precedent in their character, and their non-performance, from any cause whatever, prevented the interest in the legacy from ever attaching. All the authorities agree that conditions precedent must be strictly construed, and that nothing vests until the thing happens, whether it be possible or impossible, legal or illegal, or in conformity to public policy or against it. And in this regard we confess we do not clearly see the distinction contended for between this case and that of *Drayton v. Grimke*, Rich. Eq. Cas. 321, where it was held that a bequest to two grandsons "on their arrival at the age of twenty-one years and assuming testator's name at that period," was held to be contingent, and that the grandsons were not entitled to the profits arising before compliance with the conditions.

But as, in this case, the income was appropriated for "maintenance" as well as education of the legatee, the necessity for which might precede the time for the performance of the condition as to education, and as our view makes it unnecessary, we will not go into the refined and somewhat artificial learning upon the subject of conditions precedent and subsequent, but consider the case as one in which an equitable interest vested, subject to be defeated by the non-performance of the condition imposed. Still the plaintiff cannot recover without showing performance of the condition, if it was possible to be performed and not objectionable in itself as being against law or public policy. There is a limitation over upon the failure of the condition, and in such case the rule is that the testator shall be held to mean precisely what he says—that the words will not be considered as creating a technical condition, but rather what is called a conditional limitation. "But in regard to estates over, dependent upon the non-performance of conditions subsequent, where it is expressly provided that the es-

tate shall go over upon the failure of the conditions, the donor is held to mean precisely what he declares, and the estate over takes effect. (2 Redf. Wills, § 66 and notes ; 2 Jarm. Wills [5th Am. ed.], 527 ; *Fox v. Phelps*, 20 Wend. 437 ; *Finlay v. King's Lessee*, 3 Peters, 346 ; *Newell v. Nichols*, 75 N. Y. 87 ; 1 *Rop. Leg.* 750.)

In the first place, it is urged that the condition was impossible, and, therefore, should be disregarded. It was certainly not impossible in the sense in which that term is usually applied to conditions. "In the view of the common law a condition is said to be impossible only when it cannot, by any human means, take effect." (2 Story's Eq. 130±.) But we gather that the term "impossible" is used here in another sense, viz. : that the thing required was not to be done by the beneficiary herself, who was an infant, but by her mother or those who had charge of her education, and the bequest itself did not give the means of obtaining the education required ; and that such inadequacy made it impossible, and was caused by the testator himself. We do not take the view that the bequest was given for the purpose of educating the grandchild. It seems to us that the condition as to the manner in which she should be educated was independent of the source from which the means were to be derived. It will be observed that the *corpus* was not to be paid to Elizabeth until she attained her majority, at which time, in the ordinary course of events, it was probable her education would be completed.

The whole tenor of the will shows that the testator did not intend the trustees to take charge of his granddaughter and send her to school, providing the means to do so out of the legacy. He attached the condition and left it to the mother to do as she pleased—to act in regard to the education of her daughter in such way as to secure or renounce the legacy. It is true that he directed the income which might arise from the "one-twentieth part" of his estate (which turned out to be \$1,500) to be appropriated to the "maintenance and education of his grandchild, but he did not thereby undertake that such interest would be sufficient for that purpose, or mean anything more than to supplement the means of the mother

and even this assistance was only to be rendered on condition that the child was to be sent to a Catholic school; and, if not so sent, the interest was to be then retained and accumulate, as clearly appears in the limitation over. "But, if the said Elizabeth Magee is not educated in a Catholic seminary or school, or reared as a Roman Catholic, in the faith of the Roman Catholic Church, then it is my intention, will and direction, that this bequest shall accumulate, the interest or income, as it shall be, added to the principal until the said Elizabeth Magee's death or marriage, &c., when, on the happening of either of these events, the whole amount, principal and interest," &c., to go over.

Taking this to be the proper construction of the will, it is still suggested that the condition was "impossible" from the fact that Mrs. Magee, the mother, was unable, pecuniarily, to send her daughter away from home to a Catholic school. The rule is, that he who affirms must prove, and we do not see satisfactory evidence of the fact; but, passing that, it certainly does appear that Mrs. Magee could have utilized the interest in the hands of the trustees for that purpose, which would have been, at least, part performance, and, as suggested by one of the trustees, might have been taken as full performance. "When a literal compliance with the conditions becomes impossible, from unavoidable circumstances, and without any default of the party, it is sufficient that it is complied with as nearly as it practically can be, or, as it is technically called, *cy pres*." (1 Story's Eq. 291.)

Mrs. Magee removed from Charleston to Greenville, where there was no Catholic female seminary, and, knowing the terms of the will, made no application for interest or income except on one occasion, when she wrote to the trustees, asking assistance in the education of her daughter, not to send her, however, to a Catholic school, but to one at home of a different faith. The trustees assented to the use of the interest for the purpose of her education, but interposing the known condition that she should be sent to a Catholic school. Mrs. Magee testified: "That when Mr. O'Brien made the proposition above referred to, in 1869, he merely said that the fund was not suffi-

cient to do more than has been stated for a period of six months. In that conversation Mr. O'Brien said that he was anxious that Miss Magee should get the legacy, and that carrying out the plan suggested it would give the trustees a pretext for turning over the fund to her, that he did not propose to educate her," &c. In the delicate position in which they were placed, the trustees seem to have done their whole duty, and they have accounted and been discharged, leaving the fund for whoever may be decided to be entitled to it. Nothing more was heard of a desire to receive the interest, and we cannot resist the conclusion that it was declined on the condition of sending Elizabeth to a Catholic school, either in aid of her own means, or for the limited portion of the year the amount authorized. So that the condition cannot be disregarded upon the ground that it could not be performed in whole or at least in part.

But, assuming this to be so, it is urged that the condition itself was void as being in contravention of public policy. The phrase "public policy" is very vague, and we are not sure that we clearly understand what is meant by it, as propounding a rule for judicial action in deciding the rights of property. It is the duty of the legislature to make laws and of the court to expound them, but it is not so clearly perceived what is the duty of the court when there is no law to be expounded, and that the court is called upon to declare one. It is true that there are certain matters which courts, by decisions often repeated, have declared void as against public policy, such as contracts in restraint of trade, against marriage generally, marriage brokerage bonds, gambling debts, &c. ; but it seems to us that the subjects in which the court undertakes to make the law by mere declaration, should not be increased in number without the clearest reasons and the most pressing necessity.

We agree entirely with the authorities on the subject which point out the danger of relying on general notions of public expediency or policy, which, from time to time, may vary so much. As to that public policy which is within the cognizance of courts, we cannot conceive of a better definition than that given by a distinguished English judge, viz. : "It cannot be the

mere opinion of the judge upon any general question of public policy, or, in other words, whether the judges think that the interests of the public would be better advanced by tolerating or refusing to tolerate such provisos, but whether they are in contravention of any established law, or in contravention of the spirit, though not against the letter of the laws." This definition approaches something like clearness, and is in conformity, as we conceive, with our decisions in *Willis v. Jolliffe*, 11 Rich. Eq. 447; *Dudley v. Odom*, 5 S. C. 136.

It is not claimed that this condition is in contravention of any established law. We know of none which prohibits a citizen from using his own means in educating a grandchild, and, in doing so, to make his own choice of a school, and have the education given under particular influences, religious or otherwise. We have no hierarchy—no particular form of religious worship made lawful, and, thereby, all others made unlawful. The State knows no religious denominations further than to protect them in their rights. The members of all, as well as those who are members of none, are equally her citizens, and she has enacted no law forbidding education under the forms and influence of any of them.

The law undoubtedly is, that any person of sound mind and of full age may, by his last will and testament, duly executed, dispose of the whole or any part of his estate at his own will and pleasure, except in two or three cases specially mentioned. Our books are full of authority for saying that, for many reasons, it is regarded important to maintain in its full integrity the right which belongs to a testator to dispose of his property as he pleases, provided only his disposition is not in violation of law. This right is secured alike to every citizen, whatever is his religious faith, be he Jew or Gentile, Protestant or Catholic. This testator exercised that right, and there is certainly no express law which requires us to declare any part of his will void.

But was the condition in this will as to the manner in which the legatee should be reared and educated, in contravention of the spirit of our law? As we understand the argument, the precise point is that, as we have no form of religious

worship established by law, but the constitution declares that "No person shall be deprived of the right to worship God according to the dictates of his own conscience," any requirement attached to a bequest that the legatee shall be educated and reared at a school and under the influence of a particular denomination of Christians, is in violation of the perfect liberty of conscience vouchsafed to all; and there being no express law upon the subject, the court should declare it void as against public policy. Presented in this form it is certainly a new question in this State, if not in the United States, and one, in some aspects, not without difficulty.

The constitution does declare in the bill of rights, section 9, that "No person shall be deprived of the right to worship God according to the dictates of his own conscience;" but it also declares, in section 10, that "No form of religion shall be established by law, but it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceful enjoyment of its own mode of worship," &c. And the constitution of the United States declares that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." (Art. I, Amend. Constitution.)

Taking these provisions together we are not authorized to infer from the prohibition against an established church, that the government is indifferent to religion in all its forms. It must be supposed that the founders of our government knew that the religious sentiment, besides involving the highest interest and duty of man, has always been a potent agency in giving strength to law and permanency to order. We assume that the separation of church and State was made because it was conceived that matters of faith are too elevated and spiritual for human control, and possibly for the additional reason that the diversity of creeds rendered hopeless the task of giving authoritative sanction to one without unjustly depressing others; all being equally sound and essential in the views of those entertaining them respectively. Instead of saying that the government has renounced all, it is more correct to say that the government recognizes all religious denominations. The con-

stitution, which prohibits the establishment of any one, protects each and all "in the peaceable enjoyment of its own mode of worship." It is not denied that one of the most marked and distinctive features of our institutions is the perfect and unqualified freedom of opinion in matters of religion which they secure to all who dwell under them.

It seems to us that the leading purpose was to prohibit the establishment of any particular form of religion which would deprive persons not belonging to the favored church of the right to worship according to the dictates of their own consciences, but to go no further, except to protect all. Can it be properly said to be against the spirit of the constitution, for a member of one of these religious denominations, so protected, to endeavor by peaceable and legal means to extend his faith and to influence his children and grandchildren to adhere to the church of their fathers—for one belonging to the Presbyterian or Methodist, or any other denomination, to use such influences as argument, associations, schools, colleges, donations, &c., to impress the minds of others, and particularly the youth of the country? Because such things may have some effect in determining religious opinions, can it be truly said that, therefore, they violate liberty of conscience, and are productive of evil consequences to the public—against public policy?

As we understand it, the good work of the ministers of the different denominations, under the highest commission, is directed to the promotion of morality, the increase of religion, and making converts to their own particular tenets, and upon this privilege rests the justification of all voluntary contributions to denominational schools and colleges, which the distinguished counsel for the plaintiff admitted were legal. He said: "If the testator had, in place of the plaintiff, given his money to establish a Roman Catholic school or college, his perfect right to do so could not have been disputed. In England a trust to establish a place of worship for Protestant dissenters was held good; and also a bequest for enabling persons professing the Jewish faith to observe its rights. (1 Jarm. Will, 190.) * * * But the toleration, and I use the term in no invidious sense, of the right of one to dispose of his property is different

from the use made of it when it becomes a means of coercion," &c.

It seems to us that in principle the distinction is rather shadowy between a donation for a school to be conducted according to certain religious forms, and one to a person to be educated in that school. It is admitted that such a condition as that under consideration would be held good in England, provided the church indicated was the Church of England (*Clavering v. Ellison*, 7 H. of L. Cas. 707); but it is said that it would be held good there only for the reason that that church is established by law, "because such a condition would be the public policy declared by the government, carried out in the disposition of the property." Apply this principle to our condition. We have no established church, and therefore, in the proper sense of the term, no "dissenters." Our constitution recognizes all denominations, and directs that the general assembly shall pass laws for their protection. If recognition by law is the ground upon which courts are authorized to declare what is termed the public policy of the State, it would seem that what is allowed in England as to one, because recognized by law, might here be allowed as to all, equally recognized by the fundamental law.

We do not regard this case as analogous to that of *Egerton v. Earl Brownlow*, 4 H. of L. Cas. 149. In that case John William, Seventh Earl of Bridgewater, held under the crown a great dignity, in the nature of a public office, which was about to expire with him. He desired to have this dignity revived in his family, and for that express purpose devised his immense estates to Lord Brownlow, but if he should die "without having acquired the title of Duke or Marquis of Bridgewater, then the devise should be void." The condition of the devise was held to be void as against the public policy of England, in regard to the acquisition of dignities at the disposal of the crown. The terms of the condition made it an important matter of state. On the contrary, the matter here is purely one of private right, in regard to private property.

The power of disposition is general. The power to give includes the right to withhold or to fix the terms of gift, no

matter how whimsical or capricious they may be, only provided they do not in any way violate the law. Mr. Magee, in his lifetime, could have given money to educate his granddaughter at a particular school, or he could have withheld it at his pleasure. Suppose he had entered into a covenant with Elizabeth or her mother, that if she was educated at a particular school named, and under certain religious influences, he would, upon her attaining twenty-one years, pay to her five thousand dollars, we suppose that if she were not so educated, she could not go into the court and recover the money. Suppose, further, that before the time for payment arrived, John Magee had died, would that strengthen her claim to recover the money against his personal representatives? We are unable to see any material difference in regard to the necessity of complying with the terms imposed, between this supposed case and that of a voluntary gift by will.

We cannot say that the terms of this will so far exceed the license which is allowed the citizen in the disposition of his own property, as to render it void as against public policy. We do not understand that there was anything in this bequest which can be properly called coercion, or that Elizabeth was "deprived" of the liberty of conscience. Terms were attached to the bequest which may seem to us exacting, unkind and unnecessary, but we cannot say they were unlawful or that they were complied with. If they were declined from conscientious motives, far be it from us to say that such conduct was wrong; but, from our view of the law, we are constrained to hold that the legacy, with its accumulations of interest, must go to those to whom, in the event which has happened, it was given by the will.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the case remanded for such further orders as may be necessary.

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See POWERS, 1.

EXEMPT PROPERTY.

- A bequest to the widow of all testator's household property and the use of his house do not prevent appraisers setting apart as exempt, for her use, a horse, phaeton and harness. *Frazer's Accounting*, 258

FOREIGN EXECUTOR.*See ACTIONS.***GUARDIAN AND WARD.**

1. Money loaned to a guardian upon a void mortgage of the infant's realty, executed under an order of court, constitutes a claim against the estate in favor of the lender. *Ray v. McGinnis*, 160
2. An allowance may be made for maintenance and education out of the interest upon legacies payable to infants at their majority, with limitations over in case of death under age. *Flinn v. Flinn*, 560

*See USURY.***INHERITANCE.***See DISTRIBUTION OF ESTATES.***INTEREST.**

1. If a trustee neglect to invest funds held by him, within a reasonable time, six months being usually allowed, he is *prima facie* chargeable with interest, and he has the burden of proof, upon an accounting, to justify the delay. *Lent v. Howard*, 109
2. An executrix is entitled to the interest attached by the will to a legacy given her, although she had cash in hand sufficient at testator's death to pay the same. *Handy v. Collins*, 570

JURISDICTION.

1. The probate of a will of personalty is conclusive, and a court of equity has no jurisdiction to set the same aside because of fraud or undue influence, nor to charge the executors of such a will, as to a gift to them therein as trustees of the next of kin, on the ground that such gift was obtained by fraud. *Post v. Mason*, 48
2. The Probate Court has jurisdiction to construe a will when necessary to settle or distribute the estate. *State v. Ueland*, 118
See ACTIONS; ACCOUNTING; ADMINISTRATOR; ADMINISTRATION, 8; ELECTION.

LEGACY.

1. In order to create a charge on land devised, there must be more than a bare direction to the devisee to pay money; it must appear by express words or by necessary implication from the whole will. *Walter's Appeal*, 28
2. A legacy charged on testator's real estate and also directed to be paid by the widow out of property devised to her for life, consisting of realty and all testator's personalty, may be enforced against the real estate, and as a personal claim against a devisee, entering upon the land charged, without resorting to or exhausting the personal estate remaining at the widow's death. *Lofton v. Moore*, 164

LEGACY—continued.

3. A direction that the amount of a legacy shall be diminished by actual indebtedness of the legatee charged on testator's books, is valid. *Robert v. Corning*, 178
4. The intention of testator must govern in determining whether legacies are charged on land devised. *Sidrunk v. Ware*, 195
5. Whenever it appears that the devise was given on condition or in consideration that the devisee should pay the legacy, the land will be charged with its payment. *Id.*
6. If the executors of a will give a bond for the payment of all debts and legacies, the real estate devised to one of their number is not thereby discharged from the lien of a legacy charged thereon, and a *bona fide* mortgagee of the devisee cannot compel the legatees to exhaust the residuary estate or their remedies on the bond before proceeding against the land. *Amherst College v. Smith*, 323
7. A gift by a mother to her eldest son of all her real and personal property, he to pay her debts and the school expenses of a younger son, the personalty amounting to \$20 and the real estate to \$1,500, makes the provision in favor of the younger son a charge on the realty. *Thayer v. Finnegan*, 360
8. If a legatee of a legacy charged on land devised joins in a mortgage thereof with the devisee who is also executor, he loses, upon a foreclosure of the mortgage, his claim upon the land and all right of action for his legacy against sureties on the executor's bond. *Id.*
9. A direction that one-half of the recovery from a litigated claim should be paid to testator's wife, and the balance should be paid in certain fixed amounts, or ratable proportions, to other persons, creates specific legacies. *Maybury v. Grady*, 375
10. Specific devises and specific legacies abate ratably in case of a deficiency of assets to pay debts. *Id.*
11. A statute authorizing the payment of a legacy upon an application therefor, and an accounting to which the legatee alone is a necessary party, will not warrant such payment where the legacy is disputed. In such case there must be a final accounting where all the parties who may be affected by the adjudication are in court. *Riggs v. Cragg*, 391

See CONSTRUCTION, 1; INTEREST.

LIFE ESTATE.

- A direction by testator that the entire principal of his estate, which consisted of personalty, should be securely invested, and so remain during the lives of his children and two grandchildren, who should receive the income in equal shares, and upon the death of any one of them the survivors should receive the entire income, and, when all were dead, the fund should be divided amongst the testator's

LIFE ESTATE—continued.

heirs, creates a life estate in the children and grandchildren, and the principal property goes to the executors upon the trusts. *Davis' Appeal*, 546

See CONSTRUCTION, 9-11; DEVISE, 7.

LIFE TENANTS.

1. As between a tenant for life and remainderman of stock held in trust, funds received by the trustee from a sale of part of the franchise and permanent property of the company which issued the stock, belong to the *corpus* of the trust estate. *Vinton's Appeal*, 231
 2. Where testator bequeathed a fund to trustees to hold such property as they received, with a discretion to sell the same and substitute other investments, and after discharging certain annuities to pay the remaining "net rents and income" to certain persons for life, with remainder over, and certain bonds left by the testator, and worth more than par at his death, had become due, and others had been bought by the trustees at par and at par and accrued interest, the life tenants, as against the remaindermen, are entitled to all the net income on the bonds owned by testator or bought by the trustees at a premium, and sums paid for accrued interest should be repaid from interest subsequently received. *Hemenway v. Hemenway*, 429
 3. As between a tenant for life and remainderman of stock held in trust, money received by the trustee from a sale of the right to subscribe to an increase of capital stock is principal. *Biddle's Appeal*, 442
- See POWERS, 3, 4.

PERPETUITIES.

1. The power of alienation is not suspended by the mere creation of a trust, but only where a sale by the trustee during the existence of the trust term would be in contravention of the trust. *Robert v. Corning*, 178
2. The statute against perpetuities is not violated by directions which may involve some delay in the actual conversion or division of property, arising from the necessity of giving notice of sale or doing other preliminary acts. *Ib.*
3. A discretion to executors to defer the time of sale of testator's real estate, not exceeding a fixed period, involves no suspension of the power of alienation. *Ib.*
4. A restriction in a gift to the trustees of a charity, that the income only shall be used for the purposes of the charity, does not create a perpetuity. *Ib.*

PERPETUITIES—*continued*.

5. A provision in a will establishing a fund for the preservation, embellishment and repair of a monument erected by the testatrix, is void as creating a perpetuity for a non-charitable use. *Bates v. Bates*, 312

PLEDGE OF ESTATE SECURITIES.

- An executor or other trustee has no authority to pledge or otherwise use for his individual benefit assets of the estate, and one who takes them from him with notice acquires no rights in equity. *Nugent v. Laduke*, 188

POWERS.

1. A power of sale for an object which cannot be accomplished, cannot itself be exercised. *Bates v. Bates*, 212
 2. Where a power of sale is given to executors in their official capacity, and not by their names; upon the removal from office of one, the remaining executors can exercise it. *Denton v. Clark*, 356
 3. A devise by testator of all his real and personal estate to his wife, "to have and to hold or to dispose of so much of the same as she may need or wish to use during her lifetime, and after her death, if there is anything left," the same to be divided amongst certain persons, creates a general power of disposal not limited to the life estate, to be exercised only to the extent of her need. *Henderson v. Blackburn*, 456
 4. Where a life tenant with power to convey in fee executes such a conveyance which contains no explanation of the authority under which it is made, it will be presumed to be an exercise of the power. *Baird v. Boucher*, 467
- See* CHARITABLE USE; EQUITABLE CONVERSION; PERPETUITIES.

PROBATE.

- Probate of a will of personalty is conclusive. *Post v. Mason*, 43

RENTS AND PROFITS. *See* EQUITABLE CONVERSION.

REVIVAL OF FORMER WILL.

- Whether the cancellation of a duly executed will containing a clause expressly revoking former wills, revives a former will which has not been destroyed, is a question of intention to be collected from all the circumstances of the case. *Pickens v. Davis*, 235
- See* EVIDENCE, 7.

REVOCATION OF ADMINISTRATION.

1. An intestate's widow has no interest in petitioning for the removal of an ancillary administrator who is administrator at the place of deceased's domicile, where she resides. *White v. Spaulding*, 347
2. A mere allegation that a petitioner for the removal of administrator

REVOCATION OF ADMINISTRATION—continued.

is a creditor of deceased, is not enough without a *prima facie* showing of how he became such. *Id.*

3. A petition of removal "for non-performance of his duty," is not sufficiently specific to put the administrator on his defense. *Id.*

4. Notice of proceedings to remove an administrator living in a foreign jurisdiction, must be served personally on him and on the heir at law. *Id.*

5. Non-residence is not of itself a sufficient ground to remove an ancillary administrator who is also administrator at deceased's place of domicile. *Id.*

REVOCATION OF WILL.

1. The drawing of scrolls through the signature to a will in such manner as not to obliterate it or render it illegible, is not a "destruction" of the will, within the statute regulating revocations. *Gay v. Gay*, 540

2. Where the act relied on is sufficient to work a revocation if done with intent to revoke, declarations of the testator are admissible to prove such an intention. *Id.*

3. The birth and recognition of an illegitimate child subsequent to the execution of a will by the father revokes such will. *Milburn v. Milburn*, 544

See REVIVAL OF FORMER WILL.

STATUTE OF LIMITATIONS.

1. The statute of limitations runs against such a debt from the date of the testator's death. *Etter v. Greenawalt*, 84

2. A valid title cannot be obtained from an executor *de son tort* by limitation, as the statute does not run till the issuing of letters of administration. *Rockwell v. Young*, 471

TRUST.

1. A devise by the testator to his wife, "with a special request that at her death she give the said lands to be equally divided between her near relatives and mine," creates a trust for the benefit of such relatives. *Handley v. Wrightson*, 580

2. The expression "near relatives" is legally certain, and means such persons as will take under the statute of distributions. *Id.*

3. A bequest in trust for the maintenance and education of a granddaughter upon condition that she is educated in a Roman Catholic school, and is raised in that faith, with a limitation over, is not void for uncertainty, for impossibility, unconstitutionality, or as against public policy. *Mages v. O'Neill*, 591

TRUST—*continued.*

4. As to distribution of stock dividends, interest, premiums and cash dividends between life tenants and remaindermen. *Vinton's Appeal*, 281; *Hemenway v. Hemenway*, 429; *Biddle's Appeal*, 442
See CHARITABLE USE; CONVERSION OF TRUST FUND; PERPETUITIES.

TRUSTEE.

1. A provision in the will, exempting trustees from liability "for any loss or damage that may happen to my estate except the same shall occur or take place from their own willful default, misconduct or neglect," protects them against losses by improvident or careless investment. There must have been a willful and intentional disregard of the rules of prudence. *Crabb v. Young*, 265
2. If trustees act in good faith in making investments, subsequent events which they could not foresee or control, operating to depreciate the value of the securities, do not render them liable to make good the loss to the estate. *Ib.*, 109
3. Liability for interest. *Lent v. Howard*, 109
4. Right to pledge estate securities. *Nugent v. Laduke*, 188
5. As to when executor is held to have assumed duties of trustee. *Crocker v. Dillon*, 406; *Earle v. Earle*, 445

UNDUE INFLUENCE.

- A will executed by one having full testamentary capacity is not, as matter of law, fraudulent for the simple reason that it contains a provision in favor of the draughtsman, who was and had been testator's counsel. *Post v. Mason*, 43
See EVIDENCE, 10, 11.

USURY.

- The reception by a guardian of a bonus upon the loan of estate moneys does not make the transaction usurious within the statute. *Fellows v. Longyor*, 97

WILL.

1. A writing conveying certain personalty and realty to-deceased's son-in-law, for the natural life of deceased and his wife, the devisee to pay the taxes annually, take care of deceased and his wife while they lived, pay their funeral expenses, and take care of their daughter till married, and "pay me \$250 by the first of January in each year during the natural lifetime of myself and wife," is a valid will and creates an annuity of \$250 in favor of testator's widow, which is a charge on the land devised. *Castor v. Jones*, 148
2. A direction that the amount of a legacy shall be diminished by act-

WILL—*continued.*

- ual indebtedness of the legatee charged on testator's books, is valid. *Robert v. Corning*, 178
8. Testator executed, at different times, two wills, and later a writing styled a "codicil," in which he directed that if he died within three months the first testament should be his last will, and upon his decease after such time the last writing should take effect. Testator died within the three months. *Held*, that the first will took effect and the codicil must be construed as a codicil thereto. *Bradish v. McClellan*, 201
4. Entries of a testamentary character, made at different dates in a diary in deceased's handwriting, over his signature, may be probated as a holographic will. *Reagan v. Stanley*, 251
5. An entry of a testamentary character by decedent, in a diary, may be proved as a will of personalty, although not signed by him. *Id.*
6. A testamentary paper written and subscribed by testator with the intention of making it his will, is such, although he may have erroneously thought it void for want of legal formality. *Toebbe v. Williams*, 333
7. An instrument executed by deceased, commencing, "In anticipation of my departure from the city of Baltimore, and to provide for possible contingencies," and bargaining and selling to his daughter all his goods, chattels and effects, reserving the use of the same and right to dispose of the same otherwise, may be probated as a will, although deceased returned safely from the contemplated trip. *Kelleher v. Kernan*, 417
8. A paper printed in the form of a stationer's blank, with the vacant spaces filled in deceased's handwriting, is not an olographic will in whole or in part. *Estate of Rand*, 460

See EVIDENCE; REVOCATION; REVIVAL OF FORMER WILL.

WORDS AND PHRASES.

See CONSTRUCTION.



